(13)

No. 05-1074

Title:	Lilly M. Ledbetter, Petitioner v. The Goodyear Tire & Rubber Company, Inc.
Docketed:	February 23, 2006
Lower Ct:	United States Court of Appeals for the Eleventh Circuit
Case Nos.:	(03-15264-GG)
Decision Date:	August 23, 2005
Rehearing Denied:	October 26, 2005

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jan 9 2006	Application (05A633) to extend the time to file a petition for a writ of certiorari from January 24, 2006 to March 25, 2006, submitted to Justice Kennedy.
Jan 10 2006	Application (05A633) granted by Justice Kennedy extending the time to file until February 17, 2006.
Feb 17 2006	Petition for a writ of certiorari filed. (Response due March 27, 2006)
Mar 9 2006	Waiver of right of respondent Goodyear Tire and Rubber Company, Inc. to respond filed.
Mar 22 2006	DISTRIBUTED for Conference of April 14, 2006.
Apr 3 2006	Response Requested . (Due May 3, 2006)
Apr 17 2006	Order extending time to file response to petition to and including May 26, 2006.
May 26 2006	Brief of respondent Goodyear Tire and Rubber Company, Inc. in opposition filed.
Jun 5 2006	Reply of petitioner Lilly M. Ledbetter filed. (Distributed)
Jun 6 2006	DISTRIBUTED for Conference of June 22, 2006.
Jun 26 2006	Petition GRANTED.
Jul 20 2006	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including August 31, 2006.
Aug 8 2006	Consent to the filing of amicus briefs in support of either party received from counsel for the respondent.
Aug 8 2006	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
Aug 10 2006	Extension of time within which to file respondent's brief on the merits to and including October 23, 2006.
Aug 30 2006	Further extension of time within which to file the joint appendix and petitioner's brief on the merits to and including September 7, 2006.
Aug 31 2006	Brief amici curiae of National Employment Lawyers Association, et al.

	filed.
Aug 31 2006	Brief amicus curiae of National Partnership for Women & Families filed.
Sep 7 2006	Joint appendix filed.
Sep 7 2006	Brief of petitioner Lilly M. Ledbetter filed.
Sep 29 2006	SET FOR ARGUMENT ON Monday, November 27, 2006.
Oct 4 2006	CIRCULATED.
Oct 23 2006	Brief of respondent Goodyear Tire and Rubber Company, Inc. filed. (Distributed)
Oct 23 2006	Brief amicus curiae of United States filed. (Distributed)
Oct 23 2006	Brief amici curiae of Equal Employment Advisory Council, et al. filed. (Distributed)
Oct 23 2006	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed. (Distributed).
Oct 23 2006	Record received from U.S.C.A. 11th Circuit. (1 envelope)
Oct 27 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Nov 13 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Nov 14 2006	Reply of petitioner Lilly M. Ledbetter filed. (Distributed)
Nov 27 2006	Argued. For petitioner: Kevin K. Russell, Washington, D.C. For respondent: Glen D. Nager, Washington, D.C.; and Irving L. Gornstein, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

Supreme Court, U.S.
FILED

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IN THE

Supreme Court of the United States

Lilly M. Ledbetter,

Petitioner,

v.

Goodyear Tire and Rubber Company, Inc.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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February 17, 2006

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QUESTION PRESENTED

Whether and under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period.

PARTIES TO THE PROCEEDINGS BELOW

There were no parties to the proceedings below other than those identified in the caption of this petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Lilly M. Ledbetter respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. App. 1a-37a) is published at 421 F.3d 1169. The district court's order and memorandum opinion on post-trial motions (Pet. App. 38a-42) is unpublished. The district court's order on the objections to the magistrate judge's report and recommendation on the defendant's motion for summary judgment, and the report and recommendation itself (Pet. App. 46a-82a), are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2005. The court denied a petition for rehearing and rehearing en banc on October 26, 2005. Pet. App. 83a. On January 10, 2006, Justice Kennedy extended the time in which to file this petition to and including February 17, 2006. App. No. 05A633. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISION

42 U.S.C. 2000e-5(e)(1) provides, in relevant part:

"A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred * * * ."

STATEMENT

A jury found that respondent Goodyear Tire and Rubber Company paid petitioner less than her male counterparts because of her sex. The court of appeals reversed, holding – contrary to the law of the Second and D.C. Circuits – that an employer is shielded from *any* liability for pay discrimination

if the wage disparity stems from an intentionally discriminatory pay decision that occurred prior to the 180-day limitations period established by Title VII for filing charges of discrimination with the Equal Employment Opportunity Commission (EEOC).

1. Title VII prohibits discrimination "against any individual with respect to his compensation * * * because of such individual's race, color, religion, sex or national origin." 42 U.S.C. 2000e-2(a)(1). Any person subject to such discrimination may file a charge of discrimination with the EEOC "within one hundred and eighty days after the alleged unlawful employment practice occurred." *Id.* § 2000e-5(e)(1).[1] If the EEOC is unable to secure voluntary compliance from the employer and elects not to file suit on behalf of the employee, the employee can receive a "right to sue" letter and institute a private action against the employer. *Id.* § 2000e-5(f)(1). The employee then has ninety days to initiate a lawsuit. *Ibid.*

2. On March 25, 1998, petitioner Lilly Ledbetter filed a charge with the EEOC alleging that she had been subjected to sex discrimination by respondent Goodyear Tire and Rubber Company.[2] Pet. App. 9a. Ledbetter filed this action on November 24, 1999, alleging – among other things – that Goodyear discriminated against her, in violation of Title VII, by paying her substantially less than her male counterparts for

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[1] In some circumstances, not present here, the limitations period is 300 days. See 42 U.S.C. 2000e-5(c), (e).

[2] The initial charge took the form of an EEOC questionnaire. Ledbetter subsequently filed a more formal charging document in July 1998. Both the parties and the Eleventh Circuit assumed for the purposes of this appeal that the allegations in the July 1998 document related back to the original filing and that the relevant date of the EEOC charge, for purposes of the limitations period, was March 25, 1998. Pet. App. 15a.

the same work because of her sex.[3] *Ibid.* Ledbetter sought backpay for the period beginning 180 days before she filed her EEOC charge, as well as damages for mental anguish and punitive damages. A jury returned a verdict in Ledbetter's favor, rejecting Goodyear's assertion that the pay differential was the result of neutral application of a merit-based pay system. *Id.* 10a-11a.

a. The evidence at trial showed that Ledbetter worked at Goodyear's Gadsden, Alabama plant for approximately nineteen years, from 1979 until her retirement in 1998.[4] Pet. App. 5a-9a. For almost her entire career, she served as an Area Manager or its equivalent, with responsibilities for supervising the production of tires at the plant. *Ibid.* During her career, approximately eighty people worked as Area Managers at the Gadsden plant, only three of whom, including Ledbetter, were women. Trial Tr. vol. I, 30.

Ledbetter presented an array of evidence that ongoing sex-based discrimination by Goodyear led to substantial pay differentials between herself and her male counterparts. For example, during her tenure at the plant, the plant manager told Ledbetter that "the plant did not need women," that women "didn't help it," and that they "caused problems." Tr. vol. I, 29. Moreover, Ledbetter and the two other women who worked as Area Managers during her tenure were all paid less than their male coworkers. Tr. vol. II, 209–213, 223–229, 280, 339, 358–360; Def.'s Ex. 61; Pl.'s Ex. 98. In fact, at the end of 1997, Ledbetter was the lowest paid of sixteen Area Managers in Tire Assembly. Pet. App. 8a. By 1998, Ledbetter's salary was more than twenty percent lower than the lowest-paid male Area Manager with comparable experience. Tr. vol. I, 31–34; Pl.'s Ex. 201.

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[3] Ledbetter also alleged a series of discriminatory acts in relation to her transfer in 1998 to an inferior position. Pet. App. 59a-61a, 65a, 69a-70a, 77a-78a. Those claims are not at issue here.

[4] Ledbetter was temporarily laid off in 1986 and 1989. Pet. App. 5a.

This pay differential was accomplished through discriminatory annual evaluations and pay raises. Each year, Goodyear considered whether to give each employee a raise and, if so, for what amount.[5] Pet. App. 4a. While Goodyear asserted that the pay decisions were based solely on merit, Ledbetter established to the jury's satisfaction that this was false and that she was repeatedly given lower pay raises – or, indeed, no pay raise at all – because of her sex. *Id.* 11a. The jury was told, for example, that one Performance Auditor had admitted to manipulating some of the performance data upon which Ledbetter's salary decisions were based, Tr. vol. I, 41–43; Tr. vol. II, 141–143; Pl.'s Ex. 23, and that Ledbetter's supervisor during this time considered her to be a "troublemaker" because of her complaints of discrimination, Tr. vol. I, 37–38. The evidence further established that this discrimination was ratified each year, when Goodyear based Ledbetter's salary on the prior year's discriminatory pay rate. See *supra* note 5. This discrimination continued until Ledbetter took early retirement in November 1998. Pet. App. 9a.

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[5] Although the court of appeals did at one point describe Goodyear's annual pay raise decisions as "re-establishing employee pay" each year, Pet. App. 24a, both the decision and the record make clear that the annual reviews did not result in a *de novo* consideration of employees' proper salary. Rather, employees' salary rates carried over from the prior year, subject to possible "annual merit-based raises." *Id.* 4a; see also *ibid.* (describing how, "in the early months of each year, each [manager] was charged with recommending salary increases for the salaried employees under his or her supervision"); *id.* 4a-5a (annual evaluation included employee's "performance ranking, present salary, and salary range; the date of his or her last increase; the recommended increase for the coming year (in dollars and as a percentage increase over present salary); and the date that the increase would become effective"); *id.* 6a-7a & n.3 (noting caps and other limitations on the amount of raises).

b. In the district court, Goodyear moved for judgment as a matter of law on the ground that Ledbetter's claims were untimely. Pet. App. 10a-11a. Goodyear argued that even if it had paid Ledbetter a discriminatory wage within the limitations period, it was nonetheless immune from liability because the pay disparity arose from decisions that occurred more than 180 days before Ledbetter had filed her EEOC charge. *Ibid.* The district court denied the motion, and the case proceeded to trial. *Ibid.*

Following the close of testimony and without objection from Goodyear, the district court instructed the jury that Ledbetter was required to "prove that each claim arose within six months of her filing a charge of discrimination with the EEOC." Tr. vol. III, 457. The court further instructed the jury that damages could only be imposed for the period "beginning six months from the day that she filed her EEOC questionnaire." *Id.* at 462.[6]

The jury returned a verdict in Ledbetter's favor on her discriminatory pay claims, finding it "more likely than not that [Goodyear] paid [Ledbetter] an unequal salary because of her sex." Tr. vol. III, 476. The jury awarded backpay, damages for mental anguish, and punitive damages. *Id.* at 476-77.

After trial, Goodyear challenged the sufficiency of the evidence and renewed its motion for judgment as a matter of law, again arguing that it was immune from liability for any pay differential within the limitations period attributable to decisions made more than 180 days before Ledbetter submitted her EEOC charge. Pet. App. 11a. The district court again denied the motion. *Ibid.* The court first concluded that the "jury's finding that Plaintiff was subjected

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[6] The court denied Goodyear's request for an additional instruction requiring that the jury find Ledbetter's sex influenced "decisions made" in the six months prior to her filing a charge of discrimination. Tr. vol. II, 400.

to a gender disparate salary is abundantly supported by the evidence." *Id.* 12a. The court further rejected Goodyear's construction of Title VII's limitations provision, holding that Ledbetter was "entitled to recover for the disparate salaries from March 25, 1996, until her retirement thirty-one months later." *Id.* 41a. The court then concluded that the evidence supported an award of $60,000 in backpay, as well as punitive damages. *Id.* 42a.[7]

3. A panel of the Eleventh Circuit reversed in light of its construction of this Court's decisions in *Bazemore* v. *Friday*, 478 U.S. 385 (1986) and *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101 (2002).

In *Bazemore* v. *Friday*, this Court had held it "too obvious to warrant extended discussion" that "[e]ach week's pay check that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." 478 U.S. at 395. In the ensuing fifteen years, the Third, Fourth, Sixth, Eighth, Tenth, Eleventh, and D.C. Circuits all interpreted *Bazemore* to hold that Title VII claims challenging disparate pay are not time-barred so long as the plaintiff received "at least one paycheck" implementing the challenged pay rate within the statutory claim period. Pet. App. 20a & n.17.

Although this Court's opinion in *National Railroad Passenger Corp.* v. *Morgan*, specifically approved this Court's holding in *Bazemore*, 536 U.S. at 112, the Eleventh Circuit nonetheless held that *Morgan* rendered Lebetter's pay claims untimely. *Morgan* involved allegations of a hostile work environment claim. However, in the course of explaining why the employee's hostile work environment

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[7] The jury had originally awarded Ledbetter much more in backpay. See Pet. App. 11a. Ledbetter did not appeal the reduction. The district court also remitted the amount of punitive damages awarded by the jury, a reduction Ledbetter also did not appeal. *Id.* 12a.

claim involved a continuing violation and was not time-barred, the Court observed that "discrete" instances of unlawful employment practices are not actionable if time-barred because "each discriminatory act starts a new clock for filing charges" based on that act. *Id.* at 113-14. Relying on this language, the Eleventh Circuit reasoned that "in a case in which the plaintiff complains of discriminatory pay, there are only two possible sources of such conduct: the decisions setting the plaintiff's salary level or pay rate, and the issuance of paychecks reflecting those decisions." Pet. App. 18a. Because the court concluded that "the operative act of discrimination will always be, not the act of issuing paychecks, but the act of making the underlying decision about what the plaintiff should be paid," it held that the pay decision, not the payment of the discriminatory wage, was the relevant act for determining the running of the Title VII limitations period. *Id.* 23a.

The court of appeals then held that when an "employer has a system for periodically reviewing and re-establishing employee pay, an employee seeking to establish that * * * her pay level was unlawfully depressed may look no further into the past than the last affirmative decision directly affecting [her] pay immediately preceding the start of the limitations period." Pet. App. 24a. Moreover, the court cautioned that it did not "hold that an employee may reach back even that far; what we hold is that she may reach no further." *Id.* 14a. The court acknowledged that its decision was in conflict with the post-*Morgan* decisions of other courts of appeals, including the Second and D.C. Circuits. *Id.* 27a & n.19.

Applying its new standard to this case, the Eleventh Circuit found insufficient evidence that Ledbetter's two most recent denials of raises had been based on her sex. Pet. App. 31a-32a. Although those raise decisions left in place a prior salary was already substantially lower than Ledbetter's male colleagues, and although the court did not question that this pre-existing disparity was the result of prior illegal sex

discrimination, the court of appeals nonetheless directed that the jury verdict be reversed. *Id.* 37a.

4. On September 13, 2005, Ledbetter filed a petition for rehearing en banc, emphasizing the panel's acknowledged departure from the rule applied in other courts of appeals. EEOC also submitted an amicus brief in support of the petition in which it argued that "the principles enunciated by the Supreme Court in *Bazemore* are still applicable after *Morgan*," and that, "[u]nder these principles, each paycheck Ledbetter received that was lower than it otherwise would have been because of her sex is a 'wrong actionable under Title VII,' even if the sex-based disparity was caused by decision made years earlier." Br. 9. Like Ledbetter, the EEOC also pointed out that the panel's decision conflicted with other post-*Morgan* decisions, including decisions from the Second and D.C. Circuits – each of which had permitted indistinguishable claims in reliance on *Bazemore*. *Ibid.* The petition for rehearing was nonetheless denied on October 26, 2005. Pet. App. 83a. This petition followed.

REASONS FOR GRANTING THE WRIT

As the EEOC noted in urging the Eleventh Circuit to reconsider the decision below en banc, this case presents an "important issue" under Title VII upon which the courts of appeals are intractably divided in the wake of this Court's decisions in *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101 (2002), and *Bazemore* v. *Friday*, 478 U.S. 385 (1986). See EEOC Br. 1, 9-10. Given the large number of disparate pay claims filed nationally (nearly 40,000 in the last five years alone), *infra* at 16–17, and the important remedial purpose of Title VII, such a conflict is untenable. At the same time, the decision below is wrong, conflicting with this Court's clear instruction in *Bazemore* that the Title VII limitations period does not provide an employer license to continue pay discrimination in perpetuity whenever an employee fails to immediately challenge the initial pay decision. The Eleventh Circuit's contrary view, which also

conflicts with the EEOC's long-standing interpretive guidance, should be reviewed and reversed by this Court.

I. The Courts of Appeals Are Intractably Divided Over the Question Presented.

1. The courts of appeals are divided over the proper analysis and resolution of disparate pay claims like Ledbetter's in light of *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101 (2002), and *Bazemore* v. *Friday*, 478 U.S. 385 (1986). Some courts hold that an employee may challenge disparate paychecks received during the limitations period if the paycheck implements and carries forward into the limitations period discriminatory decisions made by her employer at any point in the past. Other decisions permit employees to challenge such disparities in pay only if they can demonstrate that the disparity arises from independently illegal decisions made during the limitations period itself, or, at most, from the employer's most recent pay decision. As this case demonstrates, this legal distinction can make an enormous practical difference, effectively determining whether an employer may continue its illegal discriminatory pay policies indefinitely whenever an employee fails to object to the first discriminatory paycheck delivered within the brief Title VII limitations period.

a. The Second and D.C. Circuits have clearly and consistently held – both before and since *Morgan* – that an employee may challenge disparities in pay occurring during Title VII's limitations period regardless of when the disparity first arose.

Thus, in *Forsyth v. Federation Employment & Guidance Service*, 409 F.3d 565 (2005), the Second Circuit relied on this Court's decision in *Bazemore* to uphold a Title VII claim indistinguishable from Ledbetter's. The plaintiff in *Forsyth* "alleged that throughout his employment * * * he was paid less than similarly situated white male and female employees," who he alleged "were given more frequent wage increases or higher entry salaries than" he had been. *Id.* at

567. Like the Eleventh Circuit in this case, the district court dismissed the plaintiff's claim as untimely. *Id.* at 572. On appeal, the Second Circuit reversed. It explained that "[t]he statute of limitations for an unlawful employment practice begins to run when the unlawful practice occurs." *Ibid.* In a case of disparate pay, "each week's paycheck that delivers less to a [disadvantaged class member] than to a similarly situated [favored class member] is a wrong actionable under Title VII." *Ibid.* (quoting *Bazemore*, 478 U.S. at 395). That the illegal disparity rested on a series of pay decisions made outside the limitations period – in *Forsyth*, from a combination of an initially discriminatory pay rate and discriminatory raises over the years, see *id.* at 567-68 – was of no significance. "A salary structure that was discriminating before the statute of limitations passed is not cured of that illegality after that time passed, and can form the basis of a suit if a paycheck resulting from such a discriminatory pay scale is delivered during the statutory period." *Id.* at 573 (citing *Bazemore*, 478 U.S. at 396 n.6).

Like the Eleventh Circuit in this case, the district court in *Forsyth* found support for a contrary result in *Morgan*, but the Second Circuit disagreed. "Such view fails to recognize that *Morgan* specifically adopts the understanding set forth in *Bazemore* that every paycheck stemming from a discriminatory pay scale is an actionable discrete discriminatory act." 409 F.3d at 573 (citing *Morgan*, 536 U.S. at 111-12).[8] As a result, although the plaintiff could "only recover damages related to those paychecks actually delivered during the statute of limitations period," his claim

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[8] See also *Elmenayer* v. *ABF Freight Syst., Inc.*, 318 F.3d 130, 134-35 (CA2 2003) (noting that "the weekly cutting of a payroll check" is an actionable "periodic implementation of an adverse decision previously made"); *Pollis* v. *New Sch. for Soc. Research*, 132 F.3d 115, 119 (CA2 1997) (pre-*Morgan* decision holding that "a claim of discriminatory pay * * * involves a series of discrete, individual wrongs").

"was not time-barred as the district court wrongly believed." *Ibid.*

The D.C. Circuit faced the same questions and reached the same conclusions as the Second Circuit in *Shea* v. *Rice*, 409 F.3d 448 (2005). In that case, the plaintiff alleged that "at the time of his hiring, he was assigned a lower pay grade than similarly-situated minority hires." *Id.* at 449. That disparity persisted over a number of years, even though the employee had been subject to periodic evaluations and was given subsequent raises based on his initial placement in the government pay scale. *Id.* at 450. Even though the plaintiff's claim did not challenge a pay decision occurring within the limitations period, and even though the employer had made subsequent pay decisions that the plaintiff did not assert were discriminatory, the D.C. Circuit nonetheless held that the claim was timely and could go forward under Title VII. "Shea's complaint," the court explained, "is not simply that the [employer] discriminated against him in assigning him a lower pay grade than similarly-situated minority hires *in 1992*," but rather that as a consequence of that decision, "*he 'receiv[es] less pay with each paycheck than [he] would be [receiving] if [he] had not been discriminated[ ] against.'*" *Id.* at 452 (emphases in original, citation omitted). Like the Second Circuit, the court of appeals in *Shea* recognized that "*Bazemore* survives *Morgan*" and that these decisions dictate the conclusion that Congress intended a plaintiff to recover backpay accruing during the limitations period that was attributable to prior discriminatory decisions, notwithstanding the intervening years and pay decisions.[9] *Id.* at 453.

b. The Eleventh Circuit's decision in this case inalterably conflicts with the law of the Second and D.C. Circuits. There can be no question, for example, that the plaintiff's claim in *Shea* would be dismissed under the

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[9] See also *Anderson* v. *Zubieta*, 180 F.3d 329, 335 (CADC 1999) (holding a Title VII claim "actionable upon receipt of each paycheck").

Eleventh's Circuit rule, because the plaintiff there claimed only that his initial pay grade assignment was illegal and raised no independent claims of illegality regarding subsequent pay raise decisions. Compare *Shea*, 409 F.3d at 449-50 with Pet. App. 24a (in such cases, the plaintiff "may look no further into the past than the last affirmative decision directly affecting the employee's pay immediately preceding the start of the limitations period"). Ledbetter's claim, by contrast, would be timely in either the Second or D.C. Circuits, in which "*[a]ny* paycheck given within the statute of limitations period [is] actionable, even if based on a discriminatory pay scale set up outside of the statutory period." *Forsyth*, 409 F.3d at 573; see also *Shea*, 409 F.3d at 452 (same).

Although the Eleventh Circuit attempted to distinguish its holding from various pre-*Morgan* decisions (even while suggesting that those decisions did not "survive *Morgan*," Pet. App. 22a), it acknowledged that its holding was inconsistent with the holdings of the D.C. and Second Circuits, *id.* 26a–27a & n.19. That acknowledgment was well founded. While the Eleventh Circuit asserted that the pre-*Morgan* decisions did not "speak to how far back in time the plaintiff may reach in looking for the intentionally discriminatory act that is the central, requisite element of every successful disparate treatment claim," *id.* 22a–23a, both *Forsyth* and *Shea* held that a plaintiff could bring claims premised on discriminatory decisions that were made years before the limitations period and despite intervening pay decisions. See *Forsyth*, 409 F.3d at 573; *Shea*, 409 F.3d at 452-56.

This difference in outcome was not inadvertent but reflects a fundamental disagreement among the circuits about what constitutes an "unlawful employment practice" that triggers the running of the limitations period. 42 U.S.C. 2000e-5(e)(1). In *Morgan*, this Court made clear that the limitations period begins to run once an "unlawful employment practice" has "occurred." 536 U.S. at 110. As

noted above, the Eleventh Circuit premised its rule on its assumption that "the operative act of discrimination *will always be*, not the act of issuing paychecks, but the act of making the underlying decision about what the plaintiff should be paid." Pet. App. 23a (emphasis added). The Second and D.C. Circuits, on the other hand, premised their very different limitations rule on their conclusions that the "operative act of discrimination" is the tendering of a disparate paycheck. See *Forsyth*, 409 F.3d at 573 ("[E]very paycheck stemming from a discriminatory pay scale is an actionable discrete discriminatory act."); *Shea*, 409 F.3d at 452 ("[An] employer commit[s] a separate unlawful employment practice each time he pa[ys] one employee less than another for a discriminatory reason.").

The different rules likewise reflect conscious disagreement about the proper balance between the competing interests of employees (who face illegal pay discrimination in perpetuity if they do not promptly challenge an initial discriminatory decision) and employers (who wish to avoid stale claims). The Eleventh Circuit concluded that "to protect employers from the burden of defending claims arising from employment decisions that are long past," there must "be some limit on how far back the plaintiff can reach." Pet. App. 23a. But the D.C. Circuit directly confronted this same argument in *Shea*, and concluded that the proper balance of competing interests is the one struck by *Bazemore* – *i.e.*, allowing a challenge only to paychecks falling within the limitations period. 409 F.3d at 455-56.

c. Although the conflict in the circuits is most clear in the decisions of the Second, Eleventh, and D.C. Circuits, the proper treatment of disparate pay claims under *Morgan* and *Bazemore* has generated considerable conflict and confusion in other circuits as well.

The Eleventh Circuit's decision in this case is consistent with the Seventh Circuit's decision in *Dasgupta* v. *University of Wisconsin Board of Regents*, 121 F.3d 1138 (CA7 1997).

In that case, the plaintiff alleged that when he was hired, he was paid less than his colleagues on the basis of his national origin, and that although "he received raises similar to those that his peers received," his pay remained lower "since he was starting from a lower base." *Id.* at 1140. The continuing disparity in pay, the court held, was a "lingering effect of an unlawful act" rather than a new and distinct violation. *Ibid.* Accordingly, because the raise decisions occurring during the limitations period were not independently discriminatory, the court dismissed the claim. *Ibid.*

Subsequently, in *Hildebrandt* v. *Illinois Department of Natural Resources*, 347 F.3d 1014 (CA7 2003), the Seventh Circuit adopted a rule similar to the Eleventh Circuit's in this case, permitting plaintiffs to challenge a disparity in paychecks within the limitations period, but only so long as the disparity arose from actionable discrimination in the most recent pay raise decision before the limitations period. *Id.* at 1029; see also *Reese* v. *Ice Cream Specialties, Inc.*, 347 F.3d 1007, 1013 (CA7 2003) (holding that the plaintiff could challenge the denial of a raise when, although the denial took place outside the limitations period, there was no allegation of an intervening pay decision).[10]

In addition to conflicting with other post-*Morgan* decisions, the Eleventh Circuit acknowledged that its decision

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[10] Although *Hildebrandt* reaffirmed *Dasgupta*, 347 F.3d at 1029, and *Reese* described its decision as "consistent with" *Hildebrandt*, 347 F.3d at 1013 n.1, the decisions have been read by some to cast doubt on *Dasgupta*'s rationale. See, *e.g.*, *Reese*, 347 F.3d at 1012-13. Indeed, the Seventh Circuit has recognized that "parties around this circuit * * * find the current state of affairs to be confusing." *id.* at 1012; see also *Cardoso* v. *Robert Bosch Corp.*, 427 F.3d 429, 432 (CA7 2005) (acknowledging, but declining to resolve, the confusion). In fact, the confusion led the Eleventh Circuit to conclude that its decision in this case conflicted with the law of the Seventh Circuit. See Pet. App. 27a n.19 (citing *Reese*, 347 F.3d at 1013, and *Hildebrandt*, 347 F.3d at 1027).

squarely conflicts with the pre-*Morgan* decisions of several additional circuits. Pet. App. 20a; see also *id.* n.17 (collecting cases). A number of those decisions involved claims indistinguishable from Ledbetter's. See, *e.g.*, *Goodwin* v. *Gen. Motors Corp.*, 275 F.3d 1005, 1008-10 (CA10 2002) (noting that "over the years" the plaintiff's salary disparity grew larger "principally due to straight percentage increases" and concluding that each "discriminatory salary payment constitutes a fresh violation of Title VII"); *Brinkley-Obu* v. *Hughes Training, Inc.*, 36 F.3d 336, 348 (CA4 1994) (holding a plaintiff's disparate pay claim not time-barred because "an act of sex discrimination in compensation first inflicted at the date of hiring can thereafter continually violate the plaintiff's rights"); *Hall* v. *Ledex, Inc.*, 669 F.2d 397, 398 (CA6 1982) (permitting a claim based on a promotion decision made outside of the limitations period to go forward, despite two subsequent pay re-evaluations, because the plaintiff "suffered a denial of equal pay with each check she received").

d. The Eleventh Circuit's efforts to downplay the conflict between its decision and those that faithfully follow *Bazemore* cannot detract from the clear nature of the circuit split. In attempting to distinguish *Bazemore* and the numerous pre-*Morgan* decisions that followed it, the panel asserted that "[i]t is one thing to say that a claim is not entirely time barred because the discriminatory decision being challenged continued to be periodically implemented through paychecks issued within the limitations period," but it is a different question "how far back in time the plaintiff may reach in looking for the intentionally discriminatory act that is the central requisite element of every successful disparate treatment claim." Pet. App. 22a-23a. That purported distinction does not bear scrutiny, and, more to the point of the extent of the circuit conflict, there is no genuine prospect that it would be recognized by the Second or D.C. Circuits. As the Eleventh Circuit acknowledged, the question of "how far back" a plaintiff may reach to establish that her paycheck is based on illegal sex discrimination is governed by same

statutory provision – 42 U.S.C. 2000e-5(e)(1) – that determines whether the claim is "entirely time barred." *Id.* 19a; see also *id.* 23a (limitation on "how far back the plaintiff can reach" is required because "otherwise, the timely-filing requirement would be completely illusory in many pay-related Title VII cases").[11] Indeed, to say that a plaintiff may not rely on discrimination occurring outside the limitations period is simply another way of saying that her claim is time-barred.

Setting semantics aside, the Eleventh Circuit held that a plaintiff in Ledbetter's position is barred by Section 2000e-5(e)(1) from bringing claims based on discriminatory pay decisions occurring outside the limitations period – a proposition considered and directly rejected by the Second and D.C. Circuits, which considered the same statutory language, cases, and policy considerations reviewed by the panel in this case.

Accordingly, as the Eleventh Circuit itself acknowledged, there is a considered, fundamental disagreement between at least the Second, D.C., and Eleventh Circuits about the proper application of Section 2000e-5(e)(1) to "paycheck-as-discriminatory act cases" after *Morgan*. Pet. App. 27a.

2. This enduring conflict and confusion requires resolution by this Court. As the EEOC explained to the Eleventh Circuit, the question in this case is one of substantial importance to the administration of Title VII claims in the lower courts. See EEOC Br. 1. Each year, the EEOC receives over 25,000 Title VII charges, a significant percentage of which include allegations of disparate pay.[12] In fact, the EEOC informs petitioner that from October 1, 2000,

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[11] Thus, the panel cited to no rule of evidence or other source of evidentiary law supporting its holding.

[12] See EEOC, TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 CHARGES, available at *http://www.eeoc.gov/stats/vii.html*.

to September 30, 2005, employees filed 37,401 claims of pay discrimination with the EEOC or state equal employment agencies.[13] Moreover, as this case illustrates, the limitations question presented by the petition is frequently outcome determinative. As a result, the limitations period for disparate pay claims is a subject of frequent litigation, recurring regularly in cases throughout the country. See, *e.g.*, *Forsyth* v. *Fed'n Employment & Guidance Serv.*, 409 F.3d 565 (CA2 2005); *Shea* v. *Rice*, 409 F.3d 448 (CADC 2005); *White* v. *BFI Waste Servs.*, 375 F.3d 288 (CA4 2004); *Maki* v. *Allete, Inc.*, 383 F.3d 740 (CA8 2004); *Reese* v. *Ice Cream Specialties*, 347 F.3d 1007 (CA7 2003); *Hildebrandt* v. *Ill. Dep't of Natural Res.*, 347 F.3d 1014 (CA7 2003); *Tademe* v. *Saint Cloud State Univ.*, 328 F.3d 982 (CA8 2003); *Goodwin* v. *Gen. Motors Corp.*, 275 F.3d 1005 (CA10 2002); *Cardenas* v. *Massey*, 269 F.3d 251 (CA3 2001); *Anderson* v. *Zubieta*, 180 F.3d 329 (CADC 1999); *Pollis* v. *New Sch. for Soc. Research*, 132 F.3d 115 (CA2 1997); *Ashley* v. *Boyle's Famous Corned Beef*, 66 F.3d 164 (CA8 1995); *Brinkley-Obu* v. *Hughes Training, Inc.*, 36 F.3d 336 (CA4 1994); *Calloway* v. *Partners Nat'l Health Plans*, 986 F.2d 446 (CA11 1993); *Gibbs* v. *Pierce County Law Enforcement Agency*, 785 F.2d 1396 (CA9 1986); *Hall* v. *Ledex*, 669 F.2d 397 (CA6 1982); *Surbey* v. *Stryker Sales Corp.*, No. Civ.A. 05-0228, 2005 WL 3274579 (E.D. Va. Nov. 28, 2005); *Wiggins* v. *Powell*, No. Civ.A.02-1774(CKK), 2005 WL 555417 (D.D.C. Mar. 7, 2005); *Peters* v. *City of Stamford*, No. 3:99-CV-764 CFD, 2003 WL 1343265 (D. Conn. Mar. 17, 2003); *Anderson* v. *Boeing Co.*, 222 F.R.D. 521 (N.D. Okla. 2004); *Robinson* v.

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[13] This figure includes all charges in which both a Title VII and a disparate pay claim were made, even if the disparate pay claim was made pursuant to another statute enforced by the EEOC, such as the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Equal Pay Act. It therefore is not possible to determine the exact number of disparate pay claims under Title VII alone. That number, however, is clearly substantial.

Bd. of Regents of the Univ. of Colo., 390 F. Supp. 2d 1011 (D. Colo. 2005); *DeJesus* v. *Starr Technical Risks Agency, Inc.*, No. 03 Civ. 1298 RJH, 2004 WL 2181403 (S.D.N.Y. Sept. 27, 2004); *Quarless* v. *Bronx-Lebanon Hosp. Ctr.*, 228 F. Supp. 2d 377 (S.D.N.Y. 2002); *Tomita* v. *Univ. of Kan. Med. Ctr.*, 227 F. Supp. 2d 1171 (D. Kan. 2002); *Inglis* v. *Buena Vista Univ.*, 235 F. Supp. 2d 1009 (N.D. Iowa 2002).

The continuing uncertainty regarding the proper limitations rule in light of this Court's decisions in *Morgan* and *Bazemore*, moreover, is destructive of the basic purposes of the statute. For limitations periods to accomplish their goals of encouraging prompt resolution of complaints while fairly preserving meritorious claims for resolution on the merits, the rule must be clear and well-established. As it stands now, there is substantial uncertainty in the courts of appeals regarding if and when the analysis in *Morgan* circumscribes the principle announced in *Bazemore*, that "[e]ach week's paycheck that delivers less to [the plaintiff] * * * is a wrong actionable under Title VII." 478 U.S. at 395; see, *e.g.*, *Reese*, 347 F.3d at 1012 (acknowledging confusion regarding the application of Title VII's statute of limitations to disparate pay claims); *Cardoso*, 427 F.3d at 432 (acknowledging, but declining to resolve, the confusion); *Tademe* v. *Saint Cloud State Univ.*, 328 F.3d at 989 (noting that *Morgan* left the application of *Bazemore* unresolved, and assuming, but not deciding, that a plaintiff may base a Title VII claim on the receipt of discriminatory paychecks). Compare also *City of Hialeah* v. *Rojas*, 311 F.3d 1096, 1102-03 (CA11 2003) (holding that the receipt of a discriminatorily low pension benefit payment cannot give rise to a Title VII claim if based on a decision made outside the limitations period) with *Maki* v. *Allete, Inc.*, 383 F.3d 740, 745 (CA8 2004) (holding that a Title VII violation accrues at the moment an employee retires and her pension benefits vest).

Such uncertainty and disparate treatment of similarly situated employees is unfair and untenable. Employees are entitled to fair notice of when they must bring their claims in

order to avoid forfeiture. This is particularly true when, as in the Eleventh Circuit, the limitation rule now effectively relegates an employee to a career of second-class pay and status if she fails to complain of illegal pay discrimination within a few short months of its initiation. That employees in the Eleventh Circuit, but not the Second, should suffer this fate is also unfair. Had Ledbetter worked at the Goodyear tire plant in Tonawanda, New York, rather than the one in Gadsden, Alabama, she would have received the protections of Title VII. And because many employees of multi-state employers may move between job sites in different circuits, their federally created protections against discriminatory treatment may expand and contract depending on where they find themselves filing suit. This disparity in treatment is contrary to Congress's determination to establish nationally uniform protection against discrimination in employment.

3. The circuit split will not resolve itself without this Court's intervention. The Eleventh Circuit consciously and explicitly departed from what it recognized as the majority rule in the courts of appeals and, in particular, from the post-*Morgan* decisions of the Second and D.C. Circuits. Pet. App. 27a n.19. There is little chance that the Eleventh Circuit will revise its decision absent intervention by this Court – although both Ledbetter and the EEOC explicitly brought the circuit conflict to the court's attention in their briefs at the en banc stage, the court nonetheless denied rehearing. *Id.* 83a.

At the same time, the Second and D.C. Circuits' views are similarly entrenched. The Second Circuit has maintained its position since 1997, and has reaffirmed its holding twice since *Morgan*.[14] Similarly, the D.C. Circuit continues to apply the same rule it articulated before *Morgan*. See *Anderson* v. *Zubieta*, 180 F.3d 329 (1999). As the decisions

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[14] See *Forsyth*, 409 F.3d at 565; *Elmenayer* v. *ABF Freight Syst., Inc.*, 318 F.3d 130 (CA2 2003).

in the Seventh Circuit demonstrate, further percolation will yield more division and confusion, not less.

Finally, this case presents an ideal vehicle to resolve the circuit split and clarify the rule for the circuits struggling with the question. The question presented was clearly considered and decided by the court of appeals, and was outcome determinative in this case.

II. The Court Of Appeals' Decision Conflicts With The Decisions Of This Court And With The Purposes Of Title VII.

Certiorari is also warranted because, as the EEOC argued convincingly below, the decision below conflicts with the decisions of this Court as well as with the text and purposes of Title VII. See EEOC Br. 7-15.

1. As the EEOC has stated in its Compliance Manual, this Court's decisions in *Morgan* and *Bazemore* hold that "[r]epeated occurrences of the same discriminatory employment action, such as discriminatory paychecks, can be challenged as long as one discriminatory act occurred within the charge filing period." EEOC, COMPLIANCE MANUAL § 2-IV.C, available at *http://www.eeoc.gov/policy/docs/threshold.html#2-IV-C*. That view is not only entitled to respect, see *Morgan*, 536 U.S. at 110 n.6, but is manifestly correct.

In *Morgan*, this Court clarified the operation of Title VII's statute of limitations, making a distinction between hostile environment claims, which by their "nature involve[] repeated conduct," and discrete employment actions. 536 U.S. at 114-15. In the later category of cases, the Court explained, "[e]ach discrete discriminatory act starts a new clock for filing charges alleging that act." *Id.* at 113. In this case, as in *Morgan*, the "critical questions, then, are: What constitutes an 'unlawful employment practice' and when has that practice 'occurred.'" *Id.* at 110. In the case of illegal pay discrimination, this Court has already answered both questions definitely: "[E]ach week's paycheck that deliver[s]

less to a black than to a similarly situated white is a wrong actionable under Title VII." *Id.* at 112 (quoting *Bazemore*, 478 U.S. at 395). It is just as unlawful an employment practice to pay an employee less money than similarly situated coworkers on the basis of sex.

Accordingly, the Eleventh Circuit fundamentally erred in concluding that unlawful pay discrimination "occurs" only at "the moment the decision is made," and not when that decision is implemented. Pet. App. 18a; see also *id.* 23a. Title VII is not violated by an unexecuted decision to pay a worker less on the basis of sex; "If an employer tells his employee, 'I am going to infringe your rights under Title VII at least once every year you work for me,' this does not start the statute of limitations running on the future violations." *Reese*, 347 F.3d at 1012 (quoting *Dasgupta*, 121 F.3d at 1140); *Hildebrandt*, 347 F.3d at 1029 (same). Rather, the "unlawful employment practice" defined by Title VII is the actual payment of unequal wages and the violation occurs when the payment is rendered. See 42 U.S.C. 2000e-2(a). That one element of the offense (*i.e.*, the discriminatory intent) occurred before the offense was completed by the commission of the rest of the elements (*i.e.*, the payment of an unequal wage) does not alter the conclusion that the offense is committed when all of the elements of the offense have been committed and an injury has been inflicted. See *Bay Area Laundry & Dry Cleaning Pension Trust* v. *Ferbar Corp. of Cal.*, 522 U.S. 192, 195 (1997) ("[T]he standard rule [is] that the limitations period commences when the plaintiff has 'a complete and present cause of action.'") (quoting *Rawlings* v. *Ray*, 312 U.S. 96, 98 (1941)).

Moreover, payment of discriminatory wages is illegal each time it is repeated, even if it is only a present execution of a prior discriminatory decision. See *Forsyth*, 409 F.3d at 573; *Shea*, 409 F.3d at 455; *Hildebrandt*, 347 F.3d at 1029 (describing *Bazemore* as "involving the 'periodic

implementation of an adverse decision previously made'") (quoting *Elmenayer*, 318 F.3d at 134).[15] This conclusion is common in the law – had Goodyear illegally set the price of its tires, rather than the salary of its employees, there would be no doubt that the limitations period would start anew with each new sale even if the price-setting decision was made outside the limitations period. See *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 189 (1997) ("Antitrust law provides that, in the case of * * * a price fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, 'each overt act that is part of the violation and that injures the plaintiff,' *e.g.*, each sale to the plaintiff, 'starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.'") (citation omitted).

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[15] *Morgan* and *Bazemore* thus make clear that pay discrimination is distinguishable from the type of discrimination addressed by this Court in cases like *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977). In *Evans*, the plaintiff did not allege that her employer's present seniority system was discriminatory; "Nothing alleged in the complaint indicate[d] that United's seniority system treat[ed] existing female employees differently from existing male employees, or that the failure to credit prior service differentiate[d] in any way between prior service by males and prior service by females." *Id.* at 557-58. Rather, she asserted only that the seniority system preserved the lingering effects of a discriminatory termination decision on which the limitations period had run. *Ibid.* By contrast, Ledbetter alleged a series of discrete wrongs occurring within the limitations period, in the form of paychecks that regularly implemented an initial discriminatory salary decision. Pet. App. 2a. Discriminatory paychecks, as discrete unlawful employment practices, thus differ fundamentally from the lingering or continuing effects claim in *Evans*, because, "[i]n a salary case, * * * each week's paycheck is compensation for work presently performed and completed by an employee." *Florida* v. *Long*, 487 U.S. 223, 239 (1988).

To hold otherwise would permit an employer to permanently maintain discriminatory pay policies in place whenever a worker failed to immediately challenge the pay structure. Under such a rule, the only way an employee could reclaim her right to equal treatment under Title VII would be to quit her job and find a new employer, a result Congress surely did not intend. Title VII is meant to eliminate, rather than perpetuate workplace discrimination. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429-30 (1971) ("The objective of Congress in the enactment of Title VII * * * was to achieve equality of employment opportunities * * * . Under the Act, practices, procedures, or tests * * * cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.").

2. Despite the clear holding of *Bazemore*, reaffirmed by *Morgan*, the Eleventh Circuit held that Ledbetter brought her pay discrimination claims too late. Although it paid lip service to this Court's clear instruction that "*each* week's paycheck" providing discriminatory pay "is a wrong actionable under Title VII," *Morgan*, 536 U.S. at 112 (quoting *Bazemore*, 478 U.S. at 395) (emphasis added), the court of appeals nonetheless held that *some* such paychecks are not, in fact, actionable under Title VII if they implement a discriminatory decision made outside of (or perhaps even immediately preceding) the limitations period. Pet. App. 22a, 24a. *Bazemore* and its progeny, the court concluded, did not preclude this rule because those cases did not address "how far back in time the plaintiff may reach" to find the illegal discrimination implemented by the paychecks during the limitations period. *Id.* 24a.

This attempt to distinguish this Court's rulings in *Morgan* and *Bazemore* fails. First, as the EEOC pointed out, "the holding of the panel in this case is the same as the holding adopted by the court of appeals" – and rejected by this Court – "in *Bazemore*." EEOC Br. 10. In *Bazemore*, "the employer ha[d] a system for periodically reviewing and re-establishing employee pay," Pet. App. 24a, in precisely the

same way as Goodyear did in this case. That is, the employees in *Bazemore* were regularly ranked "according to [their] performance for the previous period" and those rankings were used to make yearly salary adjustments. 478 U.S. at 397 & n.7.[16] This Court nonetheless found actionable discrimination arising from the employer's initial discriminatory salary decision, *id.* at 397, even though the plaintiffs, like Ledbetter, had "regular opportunities to complain of improperly deflated pay and to seek a raise."[17] Pet. App. 26a. This Court explained that the plaintiff's claim was timely because the passage of time neither excused the "continuation of the pre-1965 discriminatory pay structure" nor shielded it from challenge to the extent the initial discrimination still affected the employee's present paychecks. *Bazemore*, 478 U.S. at 396. To the contrary, Title VII imposes on an employer a continuing obligation to eradicate any present disparity in pay based on illegal discrimination, even if that discrimination occurred years

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[16] Although the Eleventh Circuit loosely described this case as involving a system for "re-establishing employee pay," Pet. App. 24a, it clearly did not mean that Ledbetter's supervisors conducted a *de novo* review of her pay each year. To the contrary, Goodyear, like most employers, simply evaluated Ledbetter for a potential marginal increase to her existing salary, see *supra* note 5, as was true in *Bazemore*. There would be no need to create a special rule for employers that conduct a truly *de novo* recalculation of an employee's salary each year; the employer could simply defeat the plaintiff's Title VII claim by showing that the current pay discrepancy was caused solely by the most recent, non-discriminatory *de novo* salary evaluation, without having to rely on any statute of limitations defense.

[17] *Bazemore* thus demonstrates, contrary to the Eleventh Circuit's assumption in this case, that an evaluation system is no guarantee that salary disparities based on discriminatory practices will be rectified.

before or, indeed, prior to the effective date of Title VII. *Id.* at 397.[18]

Second, the Eleventh Circuit's decision is inconsistent with this Court's clear instruction in *Morgan* and other cases that Title VII's limitations period does not affect the scope of the evidence a plaintiff may use to prove that the discrete actions occurring within the limitations period violated Title VII. Just as "[t]he existence of past acts * * * does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed," the statute similarly does not "bar an employee from using the prior acts as background evidence in support of a timely claim." *Morgan*, 536 U.S. at 113. This Court thus has held that a discriminatory act outside of the limitations period "may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue." *Evans*, 431 U.S. at 558. See also *Local Lodge No. 1424* v. *NLRB*, 362 U.S. 411, 416 (1960).

There is nothing unusual about allowing a plaintiff to look back well beyond the limitations period to point to evidence that a recent harm was intentionally discriminatory. Indeed, in *Bazemore* this Court permitted the plaintiff to look back more than six years before the filing of the charge for evidence that the alleged salary discrimination was intentional. See 478 U.S. 385. Similarly, this Court has permitted an equal protection challenge to the present-day implementation of statutes enacted for a discriminatory purpose more than seventy-five years prior. See *Hunter* v. *Underwood*, 471 U.S. 222, 233 (1985) (permitting challenge to provision of Alabama Constitution of 1901 when

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[18] For this reason, the court in *Dasgupta*, 121 F.3d at 1140, erred in concluding that Title VII is not violated when an employer refuses to adjust an employee's pay to eliminate a pay disparity arising from illegal discrimination occurring outside the limitations period.

provision's "original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect").

3. Nor is the Eleventh Circuit's rule necessary to encourage employees to file Title VII claims promptly or to protect employers from unduly stale claims. *Contra* Pet. App. 23a. Plaintiffs already have substantial incentives to file EEOC charges promptly. Because *Morgan* precludes use of a "continuing violations" theory for disparate pay claims, employees like Ledbetter are limited to recovering the wage differential that accrues during the short limitations period established by Title VII. Accordingly, every day of delay costs the employee a day's worth of backpay, providing a substantial incentive for prompt filing. At the same time, this limitation on recovery substantially limits the scope of an employer's exposure for claims based on discriminatory decisions made outside the limitations period.

Employers are further protected from stale claims and other unfair disadvantage arising from delay by equitable doctrines, such as laches. *Morgan*, 536 U.S. at 113. Those doctrines ensure that "[e]mployers have recourse when a plaintiff unreasonably delays filing a charge" and "allow us to honor Title VII's remedial purpose without negating the particular purpose of the filing requirement, to give prompt notice to the employer." *Id.* at 121 (internal quotation omitted).[19]

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19 The Eleventh Circuit's conclusion that the interest in preventing stale claims requires precluding claims based on decisions arising outside of Title VII's short limitations period is particularly unconvincing in light of the much more extensive limitations period available for essentially identical claims under other federal statutes. For instance, under the Equal Pay Act, 29 U.S.C. 206(d), a plaintiff has two years from the time a cause of action accrues to file a claim, unless the cause of action arises out of a willful violation, in which case she has three years to file her claim. 29 U.S.C. 255(a). Similarly suits under 42 U.S.C. 1981 are

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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subject to a two-year statute of limitations in Georgia. See *Stafford* v. *Muscogee County Bd. of Education*, 688 F.2d 1383, 1389 (CA11 1982) (borrowing limitations period from GA. CODE ANN. § 3-704 (1982)).

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-15264

D.C. Docket No. 99-03137-CV-C-E

LILLY M. LEDBETTER,

Plaintiff-Appellee,

versus

GOODYEAR TIRE AND
RUBBER COMPANY, INC.,

Defendant-Appellant.

Appeal from the United States District Court
Northern District of Alabama

(August 23, 2005)

Before: TJOFLAT, DUBINA, AND PRYOR, CIRCUIT JUDGES.

TJOFLAT, Circuit Judge:

This appeal involves a claim brought under Title VII of the Civil Rights Act of 1964[1] by a former salaried employee of Goodyear Tire and Rubber Co. ("Goodyear"). The employee, Lilly Ledbetter, claims that Goodyear paid her a smaller salary than it paid her male co-workers at Goodyear's Gadsden, Alabama, tire plant because of her sex. Goodyear's position, in addition to denying that sex played any role in the setting of her salary, is that Ledbetter may prevail only if she can prove that unlawful discrimination tainted an annual review of her salary made within 180 days of her filling a charge of discrimination with the EEOC. The question we must decide, therefore, is how Title VII's timely-filing requirement applies in this specie of disparate pay cases—that is, cases involving an employer that annually reviews and re-establishes employee salary levels.

We decline to adopt Goodyear's position definitively, because we need not do so to determine whether Goodyear is entitled to the judgment as a matter of law. All we need to do is examine the last salary decision Goodyear made that affected Ledbetter's pay during the limitations period. We have done that and conclude that no reasonable jury could find that the decision was discriminitorily motivated. We therefore reverse the judgment of the district court denying Goodyear's motion for judgment as a matter of law.

I. Background and the Proceedings in the District Court

A. Background

1. The Gadsden Plant

During the relevant time period, Goodyear's Gadsden plant was divided into several discrete units, called "business centers," each of which was responsible for one of the several stages of the tire production process. The plant included at

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[1] 42 U.S.C. §§ 2000e to 2000e-17 (as amended).

least four business centers, each managed by a "Business Center Manager" ("BCM"): (1) Rubber Mixing (a.k.a. "Banbury" or the "Mixing Area"), where the rubber was prepared; (2) Component Preparation (a.k.a. "Stock Prep"), where the components for the tires were made, (Tr. at 26–27); (3) Tire Assembly (a.k.a. the "Tire Room"), where machines were used to press the components into "green," or unfinished, tires, (Tr. at 330); and (4) Curing/Final Finish, where the green tires were cured, painted, trimmed, and inspected before shipment. (Tr. at 27).

These business centers were in some cases further divided into discrete "sections" or "rooms." Tire Assembly, for example, at one point included at least four sections, (*See* PX22), including the Radial Light Truck section ("RLT"), which assembled larger tires for sport-utility vehicles and light trucks, and the "ARF Room," which assembled smaller radial tires for passenger cars. Within any one section or room, there were normally three or four rotating shifts of floor-level workers and their supervisors. (Tr. at 350)

The machines used in the tire-production process were operated directly by "tire builders"—unionized, hourly workers. The tire builders were then supervised by salaried, nonunion, floor-level managers called "Area Managers." Each Area Manager supervised one shift of tire builders, such that if a section were running four shifts, it would have four Area Managers, one for each shift. These "production teams"—the tire builders and their Area Managers—were supported by unionized maintenance and electrical workers, as well as by various salaried managerial officers and specialists, including "Production Specialists" and "Production Auditors." Directly above the Area Managers in the corporate hierarchy were the BCMs, who were responsible for everyone in their business center, including the tire builders, the maintenance and electrical workers, the Area Managers, and the salaried managerial support staff. (Tr. at 295). Supervision of the entire plant, including at least the

four production-oriented business centers described above and a Human Resources Department, fell to a single Plant Manager. (Tr. at 30).

2. The Merit Compensation System

Beginning in the early 1980s, managerial employees' salaries at the Gadsden plant were determined primarily based on a system of annual merit-based raises. The exact details of the system do not warrant extended discussion. Suffice it to say that in the early months of each year, each BCM was charged with recommending[2] salary increases for the salaried employees under his or her supervision, including the Area Managers. These recommendations were based primarily on each employee's performance in relation to that of other salaried employees in the business center during the previous year (the "performance year"). Business-center-wide performance rankings were calculated based on individual "performance appraisals" that had been completed for, and reviewed with, each employee at the end of the performance year or early in the year following. (PX12; DX17; Tr. at 263). Using the performance rankings and certain Goodyear guidelines on the size and frequency of merit-based raises, the BCM would complete a merit increase plan, a worksheet detailing the merit increases the BCM recommended for that year. These plans included, for each salaried employee, his or her performance ranking, present salary, and salary range; the date of his or her last increase; the recommended increase for

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[2] The BCMs' recommendations were subject to the approval of higher management. The merit increase planning forms, for example, asked the BCM to state the increase he "proposed" for each employee. (DX48; DX6; DX3; DX2.) Indeed, two of the four planning forms admitted into evidence were signed and dated by individuals who served as Plant Manager, and a third was signed by an individual who served as Human Resources Manager. Goodyear's compensation guidelines for 1996 state that merit increases (for that year) had to be "approved by the head of the division prior to any increase being granted." (PX17, at 6).

the coming year (in dollars and as a percentage increase over present salary); and the date that the increase would become effective. (DX6, DX48, DX2; DX3). These plans were then submitted to higher level management for approval. *See supra* note 1. Thus, each salaried employee at the Gadsden plant had his or her salary reviewed at least once annually by plant management, when the time came for the awarding of merit-based raises.

3. Lilly Ledbetter

Lilly Ledbetter hired in to the Gadsden plaint as a "Supervisor," the precursor to the Area Manager position, on February 5, 1979, at forty years of age. The record discloses very little about the first dozen years of Ledbetter's career. She worked as an Area Manager in several different business centers under several different BCMs. Twice, in 1986 and again in 1989, she was included in general layoffs, one lasting fifteen months. The record does not disclose who, prior to 1992, the other Area Managers in Ledbetter's immediate areas of the plant were, how Ledbetter fared against them in end-of-year performance rankings, or how her salary or the merit-based raises she received compared to theirs.

In early 1992, Ledbetter was selected to be part of the start-up team for the new RLT section of the Tire Assembly business center, which would produce large radial tires for sport utility vehicles and light trucks. (Tr. at 27). From the summer of 1992 until the beginning of 1996, Ledbetter was supervised in RLT by Mike Tucker, who was at first "Team Leader" for the RLT section and, after 1995, BCM for the entire Tire Assembly area. Four Area Managers worked together under Tucker in RLT from 1992 until 1996: Ledbetter, Bill Miller, Jimmy Todd, and Jerry Thompson. (DX3; DX2; PX22; Tr. at 134).

With the sole exception of performance year 1994, Tucker consistently ranked Ledbetter at or near the bottom of her co-workers in terms of performance. In 1993, he ranked her third out of the four Area Managers, and fifth out of six

salaried employees, based on her 1992 performance. (DX2, Tr. at 335). Tucker suggested, and she received, a 5.28% increase over her existing salary, the largest percentage increase given to any Area Manager, though the smallest in absolute dollars. (DX2). Jimmy Todd, who was ranked last, received no merit increase.

In planning for the merit increases for 1994, Tucker ranked Ledbetter last among the four RLT Area Managers, and last among the six salaried employees. He proposed that she receive a 5% merit increase, the smallest he proposed. (DX3).

In 1995, Tucker awarded Ledbetter a substantial increase of 7.85%, to become effective December 1, 1995, based on her performance in 1994. (PX14). The record does not reflect her exact performance ranking, but the raise she received included a 4% increase styled as an "individual performance award" and a 3.85% increase styled as a "top performance award." (PX14). According to the compensation guidelines in effect at the time, top performance awards were to be given "for only the highest level of individual performance and contribution in an organization," (PX17, at 3), and to "not more than 30% of the number of salaried associates in an organization." (*Id.*). Dual individual performance/top performance awards of the type Ledbetter received were "intended to be used to reward and recognize the uppermost level of top performer."[3] (*Id.* at 5).

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[3] Neither Ledbetter's performance appraisal for 1994 nor the merit increase planning form Tucker completed in 1995 were produced at trial, so there is no documentary record of how Ledbetter actually ranked against her colleagues. Some evidence suggests that Tucker recommended such a large increase for Ledbetter, not because she was truly a "top performer," but simply because he wanted to raise her salary and thought he could only do so significantly by giving her a "top performance award," which allowed him to exceed a 4 cap on "individual performance" awards. (*See* Tr. at 138–39, 179, 348, 363). We credit the evidence favoring

Ledbetter was ineligible for a merit increase in 1996 because her 1995 raise became effective December 1, 1995, and the minimum time interval between raises was then thirteen months, (Tr. at 141; 344), meaning that she would not be eligible for another merit increase until January 1, 1997. She was nevertheless ranked against the twenty-three other salaried employees in Tire Assembly, which had been unified under a single BCM, Tucker, in 1995. (Tr. at 344). Tucker ranked Ledbetter twenty-third out of twenty-four salaried employees, and fifteenth out of sixteen Area Managers. (DX6; Tr. at 323, 344). Jimmy Todd was ranked twenty-fourth, (Tr. at 370), and both he and the person ranked twenty-second were denied raises (DX6; DX65; DX57).

In March 1996, around the time that Tucker recommended raises for 1995's performance, Ledbetter was transferred to the "ARF room," a section of Tire Assembly that made smaller radial tires for passenger vehicles. Jerry Jones, who replaced Tucker as Tire Assembly's BCM in the summer of 1996, told her that she had been transferred because of her sub-standard performance in RLT. (Tr. at 326; PX48).

At the end of 1996, as Jones was completing the performance appraisals for that year, Pete Buchanan, the Human Resources Manager, instructed him not to evaluate Ledbetter's or Todd's performance because, based on their 1995 performance rankings, both were slated to be included in the plant's upcoming layoffs. (Tr. at 48, 297, 317–19, 362). Jones, in turn, informed Ledbetter that she would be laid off along with Jimmy Todd and a "long list" of people in departments all over the plant. (Tr. at 48, 101).

The next day, however, Jones told Ledbetter that she was to continue working, as a substitute for other Area Managers who were or would be out on extended medical leave.

Ledbetter, however, and grant her the inference that she was truly among the best performing employees in RLT in 1994.

Ledbetter worked in that capacity through 1997, and received the same monthly salary she had been paid since her last merit increase, in December 1995. Thus, at the end of 1997, she was still earning $3727 per month, less than all fifteen of the other Area Managers in Tire Assembly. The lowest paid male Area Manager was making $4286, roughly 15% more than Ledbetter; the highest paid was making $5236, roughly 40% more than Ledbetter. (DX48).[4]

Throughout 1997, Ledbetter and Jones had several conversations in which he expressed concerns about her performance. At one such meeting, in August, Jones strongly recommended that she apply for a non-supervisory Technology Engineer position that was open in the Final Finish area. He reminded her that she was still slated for layoff, and he implied that she would be laid off unless she transferred to an area not effected by the reduction in force.[5] He thought the Technology Engineer position would be good for her. Ledbetter interviewed for the position the same day and was accepted, although she continued working as an Area Manager in the ARF room for the remainder 1997.

In October, Jones transferred to another Goodyear facility and was replaced by Kelly Owen as BCM of Tire Assembly. On January 5, 1998, Ledbetter began working as a Technology Engineer—at the same salary she received in 1997. (Tr. at 55–57). She was replaced in the ARF room by

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[4] The salaries these male Area Managers were receiving included the raises they received for 1997. As stated in the text *supra*, Ledbetter received no raise for that year because she was slated for layoff.

[5] Jones told her that other Area Managers were to be laid off, "going to be cut," as he put it. (Tr. at 51–55, 106–07, 298–300, 325–327; PX48).

Jerry Thompson, who in turn was replaced in RLT by Brent Payne, a former tire builder Ledbetter had once supervised.[6]

Though Ledbetter was no longer working in Tire Assembly, Kelly Owen reviewed her performance, and that of the other salaried employees in the unit, for 1997. (Tr. at 262). Owen ranked her twenty-third out of twenty-four salaried employees and fifteenth out of sixteen Area Managers. (DX48). He ranked one male Area Manager, Dean Nance, below her. Nance, Ledbetter, and the two other lowest ranking Area Managers were all denied raises. (DX48). Because Ledbetter was denied a raise for 1998, as she had been for 1997 and 1996, she remained at the same monthly salary ($3727) she had been paid since her December 1, 1995 raise.

On March 25, 1998, Ledbetter filed a questionnaire with the Equal Employment Opportunity Commission ("EEOC"), alleging that she had been forced into the Technology Engineer position and was being subjected to disparate treatment in her new department on account of her sex. In July, she filed a formal charge of discrimination with the EEOC. This time she alleged, in addition to her earlier complaints, that she had received a discriminatorily low salary as an Area Manager because of her sex.

In August, Goodyear announced that it was going to downsize the Gadsden plant and that those who were likely be laid off would have the option of choosing early retirement. Ledbetter applied, was accepted, and retired effective November 1, 1998.

In February 1999, Goodyear announced that the Gadsden plant would close. (Tr. at 349). The plant never completely shut down, however, but large-scale layoffs were made, and

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[6] Although the record is not explicit, the inescapable inference is that Thompson and Payne continued what Ledbetter had been doing—that is, standing in for the Area Managers who were on medical leave.

several Area Managers were either laid off or given the opportunity to transfer to other plants. At the height of the layoffs and transfers, the number of Area Managers in Tire Assembly—where Ledbetter had worked from 1992 to 1998—fell to from a high of sixteen to a low of four. (Tr. at 350).

B. The Proceedings in the District Court

Ledbetter filed this lawsuit on November 24, 1999.[7] After a wide-ranging jury trial that included evidence spanning the entirety of Ledbetter's nineteen-year career, four claims were submitted to the jury: a claim that Ledbetter had been the victim of gender-disparate pay as an Area Manager, in violation of Title VII, and three claims, brought under Title VII and the Age Discrimination in Employment Act ("ADEA"), relating to her transfer to the Final Finish area as a Technology Engineer. These claims were that the transfer had been involuntarily forced upon her because of her sex or her age, or in retaliation for her having made complaints of sex discrimination.

After the district court denied Goodyear's motion for judgment as a matter of law,[8] the jury found for Goodyear on the transfer-related claims but returned a verdict in favor of

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[7] Ledbetter's complaint presented multiple claims of age discrimination, sex discrimination, and retaliation in violation of Title VII, 42 U.S.C. §§ 2000e to 2000e-1 (as amended), the Equal Pay Act ("EPA"), 29 U.S.C. § 206(d), and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621–34. Other than her disparate pay claim brought under Title VII, and her age-, sex-, and retaliation-based claims relating to her transfer to the Final Finish area as a Technology Engineer, each of Ledbetter's claims was abandoned or dismissed by the district court though summary judgment or judgment as a matter of law in favor of Goodyear. Because the jury found in Goodyear's favor on the transfer-related claims as we relate in the next paragraph of the text, the only claim at issue in this appeal is the Title VII disparate pay claim.

[8] *See* Fed. R. Civ. P. 50(a).

Ledbetter on the Title VII pay claim, finding, in a special verdict,[9] that it was "more likely than not that Defendant paid Plaintiff an unequal salary because of her sex." The jury recommended $223,776 in backpay, awarded $4,662 for mental anguish, and awarded $3,285,979 in punitive damages.

Goodyear thereafter renewed its motion for judgment as a matter of law on Ledbetter's disparate pay claim and, alternatively, moved the court to grant it either a new trial or a remittitur.[10] Goodyear contended, as it had throughout the litigation, that Ledbetter's pay claim—or, more accurately, the way she had been permitted to prove her pay claim—was barred by Title VII's requirement that the conduct complained of in a Title VII action must have been the focus of an EEOC charge filed within 180 days of the occurrence of the conduct. *See* 42 U.S.C. § 2000e-5(e)(1). Addressing its motion for judgment as a matter of law, Goodyear argued that "no reasonable fact finder could conclude that [Ledbetter's] sex was a motivating factor in a salary decision made during the period covered by [the] EEOC charge." Assuming for sake of argument that Ledbetter had made out a case for the jury, Goodyear contended that it was entitled to a new trial because the court had erred in permitting Ledbetter to challenge every annual review of her salary, from 1979 on, all but one of which fell outside the 180-day period created by her EEOC charge.

The district court denied Goodyear's motion for judgment as a matter of law but remitted the entire award to $360,000, including the statutory maximum of $300,000 in compensatory and punitive damages and $60,000 in backpay. Of Goodyear's arguments on the 180-day issue and the sufficiency of the evidence, the court said simply that

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[9] *See* Fed. R. Civ. P. 49(a).

[10] *See* Fed. R. Civ. P. 50(b).

> [t]he jury's finding that Plaintiff was subjected to a gender disparate salary is abundantly supported by the evidence. . . .
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> The jury could reasonably have found that Terry Amberson is an appropriate comparator.[11] Apparently, both he and the Plaintiff were paid the same salary on April 1, 1979, and again on April 16, 1979. Plaintiff's Exhibit ("PX") 201. The jury could reasonably have concluded that but for the gender discrimination, their salaries would have been the same up to November 1, 1998. It could have found that in the 1996–1998 period, Plaintiff's base annual salary was $44,724; and that Amberson's base salary was $59,028. (footnote omitted).

The court remitted the punitive damages to $295,338, the amount which, when combined with the $4,662 mental anguish award, reached the $300,000 cap on compensatory and punitive damages in Title VII actions against employers with more than 500 employees. *See* 42 U.S.C. § 1981a(b)(3)(D) (limiting damages awarded under Title VII to $300,000 "in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year"). Ledbetter accepted the remittitur. Judgment was therefore entered for $360,000, plus attorneys' fees and costs. Goodyear timely appealed.[12]

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[11] Terry Amberson was the highest paid of five male Area Managers Ledbetter had used as comparators. Each had worked in Tire Assembly—though not necessarily in her section or room—during Ledbetter's final years as an Area Manager.

[12] Ledbetter did not cross-appeal; accordingly, she does not challenge any of the district court's rulings.

II. Standard of Review

We review *de novo* the denial of a motion for judgment as a matter of law, applying the same standard as the district court. *E.g.*, *Russell v. N. Broward Hosp.*, 346 F.3d 1335, 1343 (11th Cir. 2003). Judgment as a matter of law is appropriate when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a)(1). When the merits of the motion turn on the sufficiency of the evidence, we review the entire record, examining all evidence, by whomever presented, in the light most favorable to the nonmoving party, and drawing all reasonable inferences in the nonmovant's favor. *See Russell*, 346 F.3d at 1343; *Brochu v. City of Riviera Beach*, 304 F.3d 1144, 1154 (11th Cir. 2002); *Lambert v. Fulton County*, Ga., 253 F.3d 588, 594 (11th Cir. 2001). Moreover, we do not assume the jury's role of weighing conflicting evidence or inferences, or of assessing the credibility of witnesses. *Brochu*, 304 F.3d at 1154–55 (quoting *Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 267 F.3d 1183, 1186 (11th Cir.2001)).

> Thus, although [we must] review the record as a whole, [we] must disregard all evidence favorable to the moving party that the jury [was] not required to believe. That is, [we] give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses."

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 151, 120 S. Ct. 2097, 2110, 147 L. Ed. 2d 105 (2000) (quoting 9A C. Wright & A. Miller, *Federal Practice and Procedure* § 2529, at 299–300 (2d ed. 1995)).

At the end of this review, we will reverse the denial of judgment as a matter of law only if "the facts and inferences point overwhelmingly in favor of [the movant], such that

reasonable people could not arrive at a contrary verdict." *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1275 (11th Cir. 2002) (quoting *Combs v. Plantation Patterns*, 106 F.3d 1519, 1526 (11th Cir. 1997)). "It bears repeating," however, "that a mere scintilla of evidence does not create a jury question. [Judgment as a matter of law] need not be reserved for situations where there is a complete absence of facts to support a jury verdict. Rather, there must be a substantial conflict in [the] evidence," *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1230 (11th Cir. 2001) (quoting *Carter v. City of Miami*, 870 F.2d 578, 581 (11th Cir. 1989)), enough such that a *reasonable* jury could find for the nonmovant.

III. Analysis

Goodyear's argument regarding Ledbetter's pay claim is two-pronged. First, Goodyear argues that Title VII's timely-filing requirement limited Ledbetter to challenging the one affirmative decision directly affecting her pay that was made within the 180-day limitations period created by her EEOC charge: Kelly Owen's February 1998 decision not to increase her salary for that year. Second, Goodyear argues that it is entitled to judgment as a matter of law because no reasonable jury could find that decision to have been improperly motived by gender discrimination.

Our analysis proceeds as follows. In Part III.A., we consider how Title VII's timely-filing requirement applies to this specie of disparate pay claims—that is, those in which the salary or pay level being challenged was periodically reviewed and re-established by the defendant-employer. We conclude that in the search for an improperly motivated, affirmative decision directly affecting the employee's pay, the employee may reach outside the limitations period created by her EEOC charge no further that the last such decision immediately preceding the start of the limitations period. We do not hold that an employee may reach back even that far; what we hold is that she may reach no further. In Part III.B.,

we apply this holding to Ledbetter's claim. We conclude that no reasonable juror could find intentional discrimination in either of the two decisions setting Ledbetter's salary as it existed during the limitations period.

A. The Timely-Filing Requirement

Under § 706 of Title VII, 42 U.S.C. § 2000e-5(e)(1), only those "unlawful employment practice[s]" that are complained of in a timely-filed charge of discrimination to the EEOC can form the basis for Title VII liability. *See, e.g., City of Hialeah v. Rojas*, 311 F.3d 1096, 1102 (11th Cir. 2002) ("If the victim of an employer's unlawful employment practice does not file a timely complaint, the unlawful practice ceases to have legal significance, and the employer is entitled to treat the unlawful practice as if it were lawful."). For claims arising in so-called "non-deferral" states, such as Alabama, to be timely, the applicable charge must have been filed within 180 days "after the alleged unlawful employment practice occurred." § 2000e-5(e)(1).[13] Therefore, only those "practice[s]" that "occurred" within 180 days of the operative EEOC charge can form the basis for Title VII liability.

The parties both assume for purposes of this appeal that the operative "charge" in this case is the EEOC questionnaire Ledbetter filed on March 25, 1998, and that her pay claim—which was included in her formal charge filed in July 1998, but not the questionnaire—should relate back to the date of the questionnaire.[14] Measuring from March 25, 1998, the 180-day period began to run on September 26, 1997. The question, therefore, is whether Ledbetter made out a claim for disparate treatment in pay based on conduct occurring after September 26, 1997.

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[13] In "deferral" states—those states that have an EEOC-like state administrative agency—a charge of discrimination must first be filed with the state agency, and the filing period is extended to 300 days.

[14] We do not pass on the correctness of these assumptions.

1. The Morgan Decision.

The Supreme Court substantially clarified the operation of Title VII's timely-filing requirement in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002), so we begin our analysis there. In *Morgan*, the Supreme Court granted certiorari to consider "whether, and under what circumstances, a Title VII plaintiff may file suit on events that fall outside [the timely-filing] period." *Id.* at 105, 122 S. Ct. at 2068. On that question, the Court reached two different answers, one for each of the two types of claims at issue in the case: (1) disparate treatment and retaliation claims challenging "discrete discriminatory or retaliatory acts," and (2) a claim alleging a hostile work environment. *See id.*

The Court held that the timely-filing requirement erects an absolute bar on recovery for "discrete discriminatory or retaliatory acts" occurring outside the limitations period. In doing so, it rejected the Ninth Circuit's "serial violations" doctrine, eschewing the notion "that so long as one act falls within the charge filing period, [time-barred] discriminatory and retaliatory acts that are plausibly or sufficiently related to that act may also be considered for purposes of liability." *Id.* at 114, 122 S. Ct. at 2072–73. The Court reasoned that "discrete acts of discrimination" such as "termination, failure to promote, denial of transfer, or refusal to hire" are easy to identify, and each "constitutes a separate actionable 'unlawful employment practice.'" *Id.* at 114, 122 S. Ct. at 2073. Because each is an identifiable violation of Title VII, "each discrete discriminatory act starts a new clock for filing charges alleging that act." *Id.* at 113, 122 S. Ct. at 2072. In such cases, there is no issue about when, in the language of the statute, the "alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). It "occurred" on the day that it "happened." *Morgan*, 536 U.S. at 109, 122 S. Ct. 2070. A party, therefore, must file a charge within either 180 or 300 days of the date of a discrete discriminatory or

retaliatory act or lose the ability to recover for it, *id.* at 113, 122 S. Ct. at 2072, regardless of whether the time-barred acts are closely related to acts alleged in a timely-filed charge. Pre-limitations acts can be used, where relevant, "as background evidence in support of [the] timely claim," *Id.* at 113, 122 S. Ct. at 2072, but they cannot themselves form the basis for liability.

The Court distinguished claims in which the plaintiff alleges that he or she was subjected to a hostile work environment. For those claims, the Court held, "consideration of the entire scope of [the] claim, including behavior alleged outside the statutory time period, is permissible for the purposes of assessing liability, so long as an act contributing to that hostile environment takes place within the statutory time period." *Id.* at 105, 122 S. Ct. at 2068. The Court reasoned that

> [h]ostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. The "unlawful employment practice" therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. Such claims are based on the cumulative effect of individual acts.

Id. at 115, 122 S. Ct. at 2073 (citations omitted). "Given," the Court said, "that the incidents constituting a hostile work environment are part of one unlawful employment practice, the employer may be liable for all acts that are part of this single claim." *Id.* at 118, 122 S. Ct. at 2075.

We think it clear that pay claims of the type Ledbetter asserts are governed by that part of the Morgan decision addressing claims alleging "discrete acts of discrimination." It is fundamental that for a Title VII plaintiff to prevail on any type disparate treatment claim, he or she must point to some

specific, conscious conduct that was tainted by the alleged improper consideration (be it "race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a)(1)). In a case in which the plaintiff complains of discriminatory pay, there are only two possible sources of such conduct: the decisions setting the plaintiff's salary level or pay rate, and the issuance of paychecks reflecting those decisions. Whether it is a pay-setting decision or the issuance of a confirming paycheck that is viewed as the operative act of discrimination, the act is, like "termination, failure to promote, denial of transfer, or refusal to hire," *Morgan*, 536 U.S. at 114, 122 S. Ct. at 2073, discrete in time, easy to identify, and—if done with the requisite intent—independently actionable. If an employee is denied a raise, given a pay cut, or hired at a deflated pay grade because of a prohibited consideration, the statute is violated and the employee can file suit the moment the decision is made. The decision would be no less unlawful if the employee were to quit the next day in exasperation and never receive a paycheck reflecting her unlawful pay rate; proving damages might be problematic, but establishing liability would not. Similarly, if the act complained of is the issuance of a discrete discriminatory paycheck (or paychecks), then the issuance of the challenged paycheck completes the "alleged unlawful employment practice" for purposes of the timely-filing requirement. Pay claims do not, therefore, have those characteristics that led the Court to devise a separate rule governing the timing of hostile work environment claims: The "unlawful employment practice" can be said to occur on a particular day (though it may be repeated on multiple days), and a single discriminatory act is actionable on its own. The alleged discriminatory behaviors need not accumulate to some critical mass to become actionable.[15]

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[15] The Seventh Circuit has reached the same conclusion. *See Reese v. Ice Cream Specialties, Inc.*, 347 F.3d 1007, 1010 (7th Cir. 2003) (concluding that "it is relatively easy to rule out" the possibility that disparate pay claims should be treated like hostile

Under *Morgan*, therefore, Ledbetter can state a timely cause of action for disparate pay only to the extent that the "discrete acts of discrimination" of which she complains occurred within the limitations period created by her EEOC questionnaire. Any acts of discrimination affecting her salary occurring before then are time-barred.

2. Ledbetter's Claim.[16]

It is undisputed that Ledbetter's claim is not entirely time barred. In February 1998, after Ledbetter had transferred to the Final Finish area to assume the Technology Engineer position, her pay level was reviewed by Kelly Owen, who decided not to recommend that she receive any raise. That decision was affirmed by higher level management at the plant. Because an affirmative decision directly affecting Ledbetter's pay was made within the limitations period (i.e.,

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environment claims after *Morgan*); *Hildebrandt v. Ill. Dep't of Natural Res.*, 347 F.3d 1014, 1028 (7th Cir. 2003) ("Using *Morgan* as our guide . . . we must conclude that each of Dr. Hildebrandt's paychecks that included discriminatory pay was a discrete discriminatory act, not subject to the continuing violation doctrine. Therefore, Dr. Hildebrandt may only recover for the discriminatory pay received within the statute of limitations period.") (footnote omitted); *cf. Pollis v. New Sch. for Soc. Research*, 132 F.3d 115, 119 (2d Cir. 1997) (concluding in a pre-*Morgan* Equal Pay Act case that "a claim of discriminatory pay is fundamentally unlike other claims of ongoing discriminatory treatment because it involves a series of discrete, individual wrongs rather than a single and indivisible course of wrongful action").

[16] We note that neither party has argued that equitable considerations require deviation from straight-forward application of the 180-day filing period. *See Morgan*, 536 U.S. at 121–22, 122 S. Ct. at 2076–77 (reaffirming that the timely-filing requirement is subject to waiver, estoppel, and equitable tolling, and holding that defendants may avail themselves of the defense of laches). We therefore have no occasion to consider, for example, the timing and extent of Ledbetter's awareness of the disparity between her salary and those of her co-workers.

after September 26, 1997), she may at least challenge that decision as discriminatory. The claim is identical in form to the raise-denial claims courts routinely consider.

The rub is that Ledbetter did not want to stop at the 1998 raise decision because doing so would have (1) limited the damages she could have recovered, (2) rendered useless evidence relevant only to other persons in the plant upon which she wanted the jury to rely, and (3) forced her to prove that Owen acted with discriminatory intent. Instead, what Ledbetter did—what the district court allowed her to do—was to point to the substantial disparity between her salary and those of the male Area Managers in Tire Assembly at the end of her career, put on circumstantial evidence that persons having control over her pay earlier in her career had discriminatory animus toward women, show that other female Area Managers in the plant were paid less than their male co-workers, and then put the onus on Goodyear to provide a legitimate, non-discriminatory reason for every dollar of difference between her salary and her male co-workers' salaries. This necessarily put at issue every salary-related decision made during Ledbetter's nineteen-year career.

To support her argument that she was entitled to prove her claim in this way, Ledbetter cites a series of pre-*Morgan* cases that, attempting to follow the Supreme Court's decision in *Bazemore v. Friday*, 478 U.S. 385, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986), essentially carved out a doctrine for applying the timely-filing requirement to disparate pay claims. Though the circuits took slightly different approaches, many held prior to *Morgan* that a Title VII claim challenging an employee's pay was not time-barred so long as the plaintiff received within the limitations period at least one paycheck implementing the pay rate the employee challenged as unlawful.[17]

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[17] This included at least the Third, Fourth, Sixth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits. *See Calloway v.*

Partners National Health Plans, 986 F.2d 446 (11th Cir. 1993) (relying on *Bazemore* in holding that a plaintiff could challenge her initial wage rate as unlawful, even though it had been established outside the limitations period, because she continued to receive paychecks within the limitations period); *Cardenas v. Massey*, 269 F.3d 251, 258 (3d Cir. 2001) ("in a Title VII case claiming discriminatory pay, the receipt of each paycheck is a continuing violation"); *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 346 (4th Cir. 1994) ("In a compensation discrimination case, the issuance of each diminished paycheck constitutes a discriminatory act"); *Hall v. Ledex, Inc.*, 669 F.2d 397, 398 (6th Cir. 1982) ("The discrimination [against the plaintiff] was continuing in nature. [She] suffered a denial of equal pay with every check she received."); *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 168 (8th Cir. 1995) (en banc) ("Ashley's Title VII pay claim is timely because she received allegedly discriminatory paychecks within 300 days prior to the filing of her administrative charge.") (citations omitted), abrogated on other grounds by *Morgan*, 536 U.S. at 101, 122 S. Ct. at 2061; *Gibbs v. Pierce County Law Enforcement Support Agency*, 785 F.2d 1396, 1400 (9th Cir. 1986) ("As each plaintiff in the instant action filed charges with the EEOC within 180 days of a [wage] payment, we conclude that plaintiffs' action is not time-barred."); *Goodwin v. Gen. Motors Corp.*, 275 F.3d 1005, 1009 (10th Cir. 2002) ("*Bazemore* . . . has taught a crucial distinction with respect to discriminatory disparities in pay, establishing that a discriminatory salary is not merely a lingering effect of past discrimination—instead it is itself a continually recurring violation."), *cert. denied*, 537 U.S. 941, 123 S. Ct. 340, 154 L. Ed. 2d 248 (2002); *Anderson v. Zubieta*, 336 U.S. App. D.C. 394, 180 F.3d 329, 335–37 (D.C. Cir. 1999) (holding that under *Bazemore*, the continued application of a discriminatory compensation scheme is itself an actionable violation, and that the plaintiffs could therefore "be made whole for those paychecks received during" the applicable limitations period).

Some circuits relied on the so-called "continuing violations" doctrine, variously defined, *e.g.*, *Calloway*, 986 F.2d at 448–49; *Cardenas*, 269 F.3d at 258, while others expressly rejected that label, *e.g.*, *Gandy v. Sullivan County, Tenn.*, 24 F.3d 861, 864–65 (6th Cir. 1994) (EPA claim). Some restricted the damages

Assuming that these cases survive *Morgan*, they do not stand for the broad proposition Ledbetter urges. It is one thing to say that a claim is not entirely time barred because the discriminatory decision being challenged continued to be periodically implemented through paychecks issued within the limitations period. It is quite another to say that the bare issuance of a lower-than-wished-for paycheck within the limitations period opens the door for a full inquiry into the motivations of every person who ever made a decision contributing to the plaintiff's pay level as it existed during the limitations period. In other words, the cases on which Ledbetter relies hold simply that pay claims are not *time-barred* if (allegedly) unlawful paychecks were issued within the limitations period; they do not speak to how far back in time the plaintiff may reach in looking for the intentionally discriminatory act that is the central, requisite element of

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recoverable to the pay lost as a result of paychecks received within the timely-filing period, *e.g.*, *Brinkley-Obu*, 36 F.3d at 346, n.22; *Ashley*, 66 F.3d at 167–68, while others at least in certain circumstances allowed the plaintiff to recover for the full two-year backpay period specified in 42 U.S.C. § 2000e-5(g)(1), *e.g.*, *Goodwin*, 275 F.3d at 1011 (misreading Ashley as agreeing with this result), *Anderson*, 180 F.3d at 335–37.

The Second Circuit never addressed the issue in the context of Title VII, but pre-*Morgan* decisions under other statutes suggest it would have adopted the majority position. *See Connolly v. McCall*, 254 F.3d 36, 41 (2d Cir. 2001) (relying on Bazemore in holding in a § 1983 case that "application of a discriminatory policy" within the limitations period preserves a claim against that policy, even if the policy was instituted outside the limitations period); *Pollis v. New School for Social Research*, 132 F.3d 115, 119 (2d Cir. 1997) (holding that Equal Pay Act claims re-accrue with the receipt of each challenged paycheck); *Kim v. Dial Serv. Int'l*, 159 F.3d 1347 (2d Cir. 1998) (unpublished table decision) (holding in a § 1981 case that "under *Bazemore*, each discriminatory paycheck constituted a new violation for which suit could be brought within the statute of limitations period beginning with its occurrence").

every successful disparate treatment claim. *E.g.*, *Denney v. City of Albany*, 247 F.3d 1172, 1182 (11th Cir. 2001) ("Disparate treatment claims require proof of discriminatory intent[,] either through direct or circumstantial evidence.")

Of course, the necessary implication of these cases is that a plaintiff whose claim is preserved by the continued issuance of improperly low paychecks can look some distance back in time for the underlying, intentionally discriminatory decision. Unless there is a claim that the person—or, more likely today, the computer—who actually issued the paychecks in question did so with intent to discriminate, the operative act of discrimination will always be, not the act of issuing paychecks, but the act of making the underlying decision about what the plaintiff should be paid. Thus, if a claim is timely only because of the continued receipt of paychecks within the limitations period, it must be that the plaintiff can point to a decision outside the limitations period as the offending act.

There must, however, be some limit on how far back the plaintiff can reach. If it were otherwise, the timely-filing requirement would be completely illusory in many pay-related Title VII cases. So long as the plaintiff received one paycheck within the limitations period that was based on the pay level he or she objects to, the plaintiff could effectively call into question every decision made contributing to his or her being paid at that level. This result would be directly contrary to the central purposes of the time-filing requirement: to "encourage prompt resolution of employment disputes," *Hill v. Ga. Power Co.*, 786 F.2d 1071, 1076 n.9 (11th Cir. 1986), and "to protect employers from the burden of defending claims arising from employment decisions that are long past," *Del. State College v. Ricks*, 449 U.S. 250, 256–57, 101 S. Ct. 498, 503, 66 L. Ed. 2d 431 (1980).

Limits on how far into the past the plaintiff can look for an intentionally discriminatory decision are most obviously warranted where, as here, the employee's pay level was

subjected to periodic re-assessment through regularly scheduled raise decisions. In such cases, the timing of the employer's compensation system creates one, obviously preferable opportunity for an employee to make any pay-related complaints: the point at which the employee's salary is reviewed and he or she is dissatisfied with the result. We think, therefore, that at least in cases in which the employer has a system for periodically reviewing and re-establishing employee pay, an employee seeking to establish that his or her pay level was unlawfully depressed may look no further into the past than the last affirmative decision directly affecting the employee's pay immediately preceding the start of the limitations period. Other, earlier decisions may be relevant, but only to the extent they shed light on the motivations of the persons who last reviewed the employee's pay, at the time the review was conducted. *See, e.g., Downey v. So. Nat. Gas Co.*, 649 F.2d 302, 305 (5th Cir. 1981) ("Although Downey's claims relating to the 1974 demotion and failure to transfer are time barred, these actions should be allowed as evidence on the question of whether Downey was constructively discharged. We observe that "(w)hile some or most of this evidence may concern time-barred conduct, it is relevant, and may be used to illuminate current practices which, viewed in isolation, may not indicate discriminatory motives." (quoting *Crawford v. Western Electric Co.*, 614 F.2d 1300, 1314 (5th Cir. 1980))).[18]

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[18] Moreover, the employee is limited to recovering for those paychecks received within the limitations period. This is the necessary consequence of *Morgan*'s holding that the timely-filing requirement "precludes recovery for discrete acts of discrimination or retaliation that occur outside the [filing] period," *Morgan*, 536 U.S. at 105, 122 S. Ct. at 2068. Obviously, "the timely filing provision was not meant to serve as a specific limitation . . . on damages." *Id.* at 119, 122 S. Ct. at 2075. But for claims based on discrete acts of discrimination, the "obvious consequence" of the strict limitation on liability is a correspondingly strict limitation on

Despite Ledbetter's contentions, our decision in *Calloway v. Partners National Health Plans*, 986 F.2d 446 (11th Cir. 1993), is not to the contrary. In *Calloway*, the plaintiff, a black woman, had accepted a secretarial position at a salary lower than her equally or less qualified white predecessor had been offered nine months prior. In addition, when the plaintiff left the company, the defendant replaced her with another white woman of equal or lesser qualifications whom it paid more than it had the plaintiff. The limitations period created by the EEOC charge supporting the plaintiff's claim did not reach back to the date she was hired. The defendant therefore argued that the claim was barred because the only conduct that occurred within the limitations period—the issuance of paychecks implementing the plaintiff's disparate pay rate—was simply "the present consequence" of a time-barred act of discrimination: hiring the plaintiff at a discriminatory initial wage rate. *Id.* at 448;

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damages, *Id.* at 126, 122 S. Ct. at 2079 (O'Connor, J., concurring in part and dissenting in part). The other circuits to address this issue after *Morgan* have all reached the same conclusion. *See Forsyth v. Federation Employment & Guidance Serv.*, 409 F.3d 565, 573 (2d Cir. 2005) ("Any paycheck given within the statute of limitations period [is] actionable, even if based on a discriminatory pay scale set up outside of the statutory period. But, a claimant [can] only recover damages related to those paychecks actually delivered during the statute of limitations period."); *Shea v. Rice*, 409 F.3d 448, 451 (D.C. Cir. 2005) ("*Morgan* dooms any hope Shea entertained that his current (and allegedly discriminatory) paychecks can resurrect his otherwise untimely challenges to the paychecks he received before January 12, 2001—or 180 days before he filed his grievance"); *Hildebrandt*, 347 F.3d at 1028 ("Using *Morgan* as our guide . . . we must conclude that each of Dr. Hildebrandt's paychecks that included discriminatory pay was a discrete discriminatory act, not subject to the continuing violation doctrine. Therefore, Dr. Hildebrandt may only recover for the discriminatory pay received within the statute of limitations period." (footnote omitted)).

see also United Air Lines, Inc. v. Evans, 431 U.S. 553, 558, 97 S. Ct. 1885, 1889, 52 L. Ed. 2d 571 (1977). The district court found that the plaintiff had proven intentional discrimination in her initial wage assignment, but it agreed with the defendant that the claim was time-barred.

A panel of this court reversed. Relying on *Bazemore* and on our own version of the "continuing violations" doctrine, the panel reasoned that "when the claim is one for discriminatory wages, the violation exists every single day the employee works [for the wages she challenges as unlawful]." *Calloway*, 986 F.2d at 448–49 (citing *Bazemore*, 478 U.S. at 396, n.6; 106 S. Ct. at 3006, n.6.). Thus, the defendant "discriminated against [the plaintiff] not only on the day that it offered her less than her white predecessor, but also on every day of her employment." *Id.* (citing *Bazemore*, 478 U.S. at 395, 106 S. Ct. at 3006 ("Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII . . . .")).

Ledbetter argues that because the plaintiff in *Calloway* was allowed to prove her claim based on the intentional discrimination reflected in her initial wage assignment, she should be allowed to do the same; if she can prove intentional discrimination in any pay decision during her career, even the setting of her initial salary, she can effectively borrow that intent and impute it to the paychecks she received during the limitations period. *Calloway*, however, did not involve, as this case does, an employee whose pay had been reviewed and re-established over a dozen times. There is no indication in the opinions of the district court or the panel in *Calloway* that the employer had in place any sort of system like Goodyear's, giving the plaintiff regular opportunities to complain of improperly deflated pay and to seek a raise. Indeed, there is no indication that any decisions were made about the *Calloway* plaintiff's pay rate between the initial date of hire and the start of the limitations period. In such cases, if a claim is allowed to go forward only because paychecks were

received within the limitations period, then of course any intentional discrimination will have to be located in the initial wage assignment. In short, we believe that *Calloway* belongs in a different category of pay-related cases and is fully consistent with the rule we announce today.

We think *Morgan* may indicate that the paycheck-as-discriminatory-act cases, including *Calloway*, read *Bazemore* too broadly and that it therefore remains an open question whether a disparate-pay plaintiff, in contrast to a pattern-and-practice pay plaintiff, should be able to challenge any decision made outside the limitations period.[19] We need not address that question today, however. Even if we assume that the paychecks Ledbetter received within the limitations period allowed her to attack as discriminatory the last affirmative decision affecting her pay before the beginning of the period, that decision—the Gadsden plant administrators' decision not to allow Jerry Jones to consider her for a raise in 1997—is not one that any reasonable jury could find discriminatory.

B. Sufficiency of the Evidence

We conclude, as we must, that Ledbetter was permitted to challenge the one raise decision that was made within the limitations period: Kelly Owen's decision to recommend that she not receive any raise in 1998. Further, we assume that, to

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[19] *But see Reese v. Ice Cream Specialties*, 347 F.3d 1007, 1013 (7th Cir. 2003) ("The Court has left a . . . narrow channel for Title VII plaintiffs who wish to complain that their paychecks, in compensation for work they have presently performed and completed in pay periods within the limitations period, are discriminatorily low because of an earlier act that occurred outside the limitations period."); *accord Forsyth v. Federation Employment & Guidance Service*, 409 F.3d 565, 572–73 (2d Cir. 2005); *Shea v. Rice*, 409 F.3d 448, 453–54 (D.C. Cir. 2005); *Hildebrandt*, 347 F.3d at 1027.

establish that intentional discrimination tainted the paychecks she received within the limitations period but before Owen's decision, Ledbetter could attack as discriminatory the plant administrators' decision not to allow Jerry Jones to consider her for a raise in 1997. The question therefore becomes whether Ledbetter presented sufficient evidence for a reasonable jury to conclude that either of these decisions violated Title VII.

Title VII, in pertinent part, makes it unlawful for an employer to "discriminate against any individual with respect to his compensation . . . because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). In this circuit, individual disparate-pay claims brought under Title VII are governed by the familiar burden-shifting framework set out by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981), and their progeny. *See Miranda v. B&B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1528 (11th Cir. 1992) (adopting the *McDonnell Douglas* framework for disparate pay claims). Under the *McDonnell Douglas/Burdine* approach,

> a female Title VII plaintiff establishes a *prima facie* case of sex discrimination by showing that she occupies a job similar to that of higher paid males. Once a *prima facie* case is established, the defendant must articulate a legitimate, non-discriminatory reason for the pay disparity. This burden is "exceedingly light"; the defendant must merely proffer non-gender based reasons, not prove them. Once such a justification is advanced, the plaintiff must demonstrate by a preponderance of the evidence that the employer had a discriminatory intent. In other words, the plaintiff must show that a discriminatory reason

> more likely than not motivated [the employer] to pay her less.

Meeks v. Computer Assocs. Int'l, 15 F.3d 1013, 1019 (11th Cir. 1994) (citations and quotation marks omitted).

This burden-shifting framework does not relieve the plaintiff of her burden of persuasion; she ultimately bears the burden of showing by a preponderance of the evidence that she was paid at a disparate rate out of intent to discriminate on the basis of sex. *See Burdine*, 450 U.S. at 253, 101 S. Ct. at 1089 ("The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."). Instead, the *McDonnell Douglas/Burdine* approach simply switches temporarily the burden of *production*, forcing the defendant (after the plaintiff has established a prima facie case) to produce a target at which the plaintiff can aim her proof—the "legitimate, non-discriminatory reasons" it offers for the pay disparity. "Rejection of the defendant's proffered reasons" does not *compel* judgment for the plaintiff as a matter of law, *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511, 125 L. Ed. 2d 407, 113 S. Ct. 2742, 2749, but in the *usual* case,[20]

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[20] It is not always the case that "the plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, [will] permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, 530 U.S. at 148, 120 S. Ct. at 2109.

> Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and

rejection of the reasons offered by the defendant, combined with the evidence supporting the prima facie case, "will *permit* the trier of fact to infer the ultimate fact of intentional discrimination." *Id.*; *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148, 120 S. Ct. 2097, 2109, 147 L. Ed. 2d 105 (2000) ("[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.").

If, therefore, the plaintiff comes forward with sufficient evidence to establish that "she occupies a job similar to that of higher paid males," *Meeks*, 15 F.3d at 1019, and the defendant in response articulates legitimate, nondiscriminatory reasons for the pay disparity, the sufficiency of the evidence on the ultimate issue of intentional discrimination generally turns on whether a reasonable jury could find that the defendant's justification for the disparity is pretextual. The question becomes whether "the plaintiff has demonstrated 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence.'" *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997) (quoting *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1072 (3d Cir. 1996)). "The risk of nonpersuasion always remains with the plaintiff." *Meeks*, 15 F.3d at 1019. "If the evidence is in equipoise on the issue of whether a salary differential is based on a factor other than sex, . . . the employer prevails . . . ." *Id.*

In this case, Ledbetter does not dispute that Goodyear came forward with legitimate, nondiscriminatory reasons for Ledbetter's being passed over for raises in 1997 and 1998.

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uncontroverted independent evidence that no discrimination had occurred.

Id.

The sole issue, therefore is whether a reasonable jury could have found those reasons to be pretexts for intentional sex discrimination. The answer is a clear "no."

1. The 1998 Decision.

There simply was no evidence produced at trial impugning Kelly Owen's motives in recommending, in February 1998, that Ledbetter receive no raise in 1998. Ledbetter was ranked twenty-third out of twenty-four employees in Tire Assembly, and fifteenth out of the sixteen Area Managers, based on her performance in 1997. (DX48). That ranking was the same in both the raw performance scores taken directly from the 1997 performance appraisals and in the weighted scores Owen used to create the business-center-wide rankings. (DX19). One male Area Manager, Dean Nance, was ranked below Ledbetter, and he and the two males ranked directly above Ledbetter were all denied raises, just as Ledbetter was.

There was no evidence that Owen purposefully underrated Ledbetter's performance for 1997. There was no evidence that he bore any ill will towards Ledbetter or toward women generally. Moreover, Owen told Ledbetter that she would not be receiving a raise when he met with her to discuss her performance appraisal, and she made no complaint about being discriminated against. (DX17, DX25). She also neglected to make any such complaint when she went to EEOC a month later about her alleged mistreatment in the Technology Engineer position. In short, Ledbetter failed to produce a scintilla of evidence from which a reasonable jury could have found that Owen's decision was in any way affected by her sex.[21]

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[21] Ledbetter did produce some evidence tending to undermine her 1997 performance appraisal. She testified that some of the audits upon which Owen would have relied in completing her performance appraisal were purposefully falsified by Mike Maudsley, the business center's Production Auditor. This, however,

2. The 1997 Decision.

The same is true of Goodyear's decision not to consider Ledbetter for a raise in 1997. The evidence uniformly confirmed that Ledbetter and others were selected in 1996 to be included in layoffs that were expected in 1997, and that Ledbetter avoided actually being out of work during 1997 only because one or more other Area Managers were out on extended medical leave and she was able to work as a substitute. The only reasonable inference is that these layoffs were instituted as the first step in the production cutbacks that ultimately led to the plant's being all but completely shut down. Just a year and half after Jones first informed Ledbetter that she was slated for layoff, Goodyear announced in August 1998 the reduction-in-force that Ledbetter volunteered to be included in. And it was only two years later, in February 1999, that Goodyear announced that the entire plant would close. Many layoffs and transfers were made, and the number of Area Managers in the Tire Assembly area dwindled from sixteen, when Ledbetter was there, to as low as four.

The uncontradicted evidence also established that Ledbetter's impending layoff was the reason for her being denied a raise in 1997. Jones's testimony to this effect went unimpeached and uncontradicted, and there is no suggestion in the record that Ledbetter properly should have been considered for a raise notwithstanding her impending layoff.[22]

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is relevant only to the accuracy of Owen's rankings, not to his intent. It is not discriminatory to honestly rely on inaccurate information, *see Silvera v. Orange County Sch. Bd.*, 244 F.3d 1253, 1261 (11th Cir. 2001); *Alexander v. Fulton County, Ga.*, 207 F.3d 1303, 1339 (11th Cir. 2000); *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991); *Smith v. Papp Clinic, P.A.*, 808 F.2d 1449, 1452–53 (11th Cir. 1987), and there was no evidence that Owen acted any way but in good-faith reliance on the information he was using.

[22] On appeal, Ledbetter argues for the first time that the layoff planned in late 1996 does not explain her being denied a raise in

Moreover, common sense suggests that scarce raise dollars would not normally be awarded an employee whose supervisors considered her departure to be imminent.

Because it was clear that Ledbetter was scheduled for layoff and was therefore ineligible for a raise in 1997, her only avenue for undermining the decision not to award her a raise was to attempt to raise the inference that she was improperly selected for the layoff. Her theory, in sum, was that she was on the "layoff list" "so they wouldn't have to give me a raise." (Tr. at 141). Ledbetter pointed to two threads of evidence that could conceivably support this theory: (1) evidence that Jerry Jones and a Plant Manager, Richard O'Dell, bore resentment against her or against women generally; and (2) evidence intended to show that she performed too well in 1995 for the company's decision to be credible.

Ledbetter's attempt to suggest that she performed too well in 1995 to be selected for layoff failed completely.[23]

1997 because it was clear by the time Jones recommended merit increases for 1997 that she would never be laid off. The evidence Ledbetter relies upon in making this argument—including evidence regarding the merit increases that were awarded by Jones in 1997—was not made part of the record of this case. Moreover, Ledbetter's own testimony supports the conclusion that she was still slated for layoff at least as late as August, 1997, well after the merit-increase planning for 1997 would have been done. She testified that Jones told her in August that she was still slated for layoff. (Tr. at 53–55, 106).

[23] There is no basis for questioning Goodyear's evidence that the layoff selections were based on 1995 performance appraisals. Jones testified that he was told by Pete Buchanan that Ledbetter and Todd had been selected layoff based on their 1995 performance. (Tr. at 317–18). Ledbetter testified that Jones told her what Buchanan had said. (Tr. at 48). And Mike Tucker testified that he was aware at the time that the selections were being made based on 1995 performance appraisals, (Tr. at 362), and that it was

Mike Tucker ranked Ledbetter twenty-third out of the twenty-four employees in Tire Assembly for the 1995 performance year. (DX6).[24] Jimmy Todd, who was also included in the layoff, was ranked last. (Tr. at 370). Thus, the two lowest performing Area Managers in Tire Assembly in 1995—the last year for which there were completed performance appraisals—were selected for the layoff. This makes inherent sense; that is, that the managers of a plant in dire financial straits (as the Gadsden plant undisputedly was) would choose for layoff those managers with the poorest recent performance history.

Ledbetter produced no evidence undermining Tucker's evaluation of her performance or suggesting that he had improper motives. Moreover, Ledbetter's next-to-last ranking in 1995 is consistent with her last-place ranking for 1993 (DX3) and her next-to-last rankings for 1992 and 1997 (DX2, DX48). There simply was no reasonable, performance-based reason for questioning Ledbetter's selection for layoff.[25]

The same is true of Ledbetter's attempt to impugn the motivations of Jones and O'Dell, because Ledbetter produced no evidence that either of these men played any role in selecting her for the layoff. Goodyear's evidence that the layoff decision was made at a level of authority above Jerry Jones went uncontradicted and unimpeached; nothing in the

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"common knowledge" in the plant that both Ledbetter and Todd had been selected.

[24] There is absolutely no evidence to support Ledbetter's repeated suggestion, at trial and on appeal, that her "top performance award" was based on her performance in 1995, rather than 1994. *See supra* note 3.

[25] We must credit the evidence that Ledbetter was among the best-performers in the RLT section of Tire Assembly in 1994. However, Ledbetter's solid performance in 1994 does not permit the inference, over direct evidence to the contrary, that she continued to be a top performer in 1995, especially given her otherwise consistently low ratings in other years.

record indicates that Jones had any role in this decision other than delivering the bad new to Ledbetter. Ledbetter's attempt to suggest that Jones bore ill will towards her because of her sex[26] therefore casts no light on the 1997 decision. The same is true of Ledbetter's testimony regarding sexist comments allegedly made by Richard O'Dell, who Ledbetter testified was Plant Manager at some unidentified point "toward[] the end of [her] career."[27] If O'Dell was Plant Manager when

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[26] Ledbetter attempted to establish that Jones treated her poorly in various ways throughout 1997. She claimed to have been ignored in meetings and denied information she needed to perform her job; she pointed to a memoranda in which Jones insensitively addressed his Area Managers as "boys" and then, after she complained, as "Boys and Lady"; and she testified that Jones had retaliated against her in the early 1980s when he was a Human Resources officer and she complained of sexual harassment by her co-workers.

Other evidence introduced by Ledbetter herself suggests that Jones treated her fairly. He was her BCM from 1985 until her temporary layoff in May 1986, and Ledbetter testified that she could recall no problems with him during this time. She also produced a note that Jones had sent her when she was selected to be part of the start-up team for the new RLT section of Tire Assembly in 1992. In it, Jones congratulated Ledbetter on her new assignment, saying that she had "worked very hard," had "made a lot of improvement in the last few years," and "deserved the opportunity." (PX8). She testified that she considered this a sincere compliment from Jones. (Tr. at 115).

[27] According to Ledbetter, O'Dell told her "that [the] plant did not need women, that we didn't help it, we caused problems." (Tr. at 29). Piling hearsay upon hearsay, she also testified (over Goodyear's objection) that one of her former supervisors (she did not specify who) told her that O'Dell asked Jerry Jones "when [he was] going to get rid of the drunk and the damn woman." (Tr. at 30.) The only other mention of O'Dell in the record is his unauthenticated signature on the merit increase plan for Tire Assembly for 1998, which was completed by Kelly Owen. (DX48). As to the timing of O'Dell's alleged comments, the records

Ledbetter was slated for layoff or when she was denied a raise in 1997, or if he had any role in these decisions, Ledbetter produced no evidence of it. His comments were therefore alone insufficient to support an inference of discrimination. *Cf. Mitchell v. USBI Co.*, 186 F.3d 1352, 1355 (11th Cir. 1999) ("In several age discrimination cases . . . this court has explained that comments by non-decisionmakers do not raise an inference of discrimination . . . .").

Moreover, the jury's rejection of Ledbetter's claims related to her transfer to the Final Finish room, to the Technology Engineer position, cannot be squared with its accepting Ledbetter's far-flung theory that her layoff was manufactured by Jones or others to avoid raising her salary. Ledbetter advanced two theories to support her transfer claims: (1) that she was deceived into voluntarily applying for the transfer by Jones's falsely telling her she would be laid off if she stayed in her Area Manager position; and (2) that she was effectively forced her into transferring by, among other things, Jones's constantly (correctly) threatening her with layoff. That the jury rejected these theories suggests that it accepted Goodyear's evidence that Jones did not mistreat Ledbetter, that he correctly told her she would be laid off if she remained an Area Manager, and that he arranged an interview for her for the Technology Engineer position as a gratuitous kindness, in an effort to keep her working until she would be eligible for full retirement. In short, if the jury had credited Ledbetter's testimony regarding Jones, it almost surely would have found in her favor on one or more of the transfer claims; that it found against her on those claims suggests it did not credit her testimony.

Given Ledbetter's failure to come forward with a scintilla of probative evidence casting doubt on Goodyear's explanation for denying her a raise in 1997, no reasonable

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suggests only that they were made after Jones became her BCM and "toward[] the end of [her] career." (Tr. at 28).

factfinder could find that the decision was motivated by Ledbetter's sex.

IV. Conclusion

In summary, because Goodyear had a system for periodically reviewing employee salaries, Ledbetter could recover on her disparate pay claim only to the extent she proved intentional discrimination in the one decision affecting her pay made within the limitations period created by her EEOC charge, or, at most, the last such decision made immediately preceding the limitations period. Because she failed to carry her burden of coming forward with sufficient evidence to permit a reasonable jury to find that either of those decisions was a pretext for sexual discrimination, the district court should have granted Goodyear judgment as a matter of law. We therefore **reverse** the judgment of the district court and instruct the court to dismiss Ledbetter's complaint with prejudice.

SO ORDERED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

LILLY M. LEDBETTER,	}	
Plaintiff,	}	
	}	
vs.	}	Civil Action Number
	}	**99-C-3137-E**
GOODYEAR TIRE AND	}	
RUBBER COMPANY,	}	
INC.	}	
Defendant.	}	

ORDER ON POST-TRIAL MOTIONS

Based on the accompanying Memorandum Opinion and the entire record in this case, it is hereby ORDERED as follows:

1 Plaintiff's Motion for Attorney's Fees and Expenses is hereby DENIED, without prejudice to its automatic reinstatement in the event that Plaintiff agrees to remittitur suggested by the Court.

2 Defendant's Renewed Motion for Judgment As A Matter of Law is GRANTED solely to the extant that the jury's award of $328,597.93 in backpay for retaliation, age, and sex discrimination is hereby VACATED. In all other respects, the Motion for Judgment As A Matter of Law is DENIED.

3 Defendant's alternative Motion For A Remittitur is hereby GRANTED. The Judgment previously entered in this case is hereby REDUCED to $360,000, conditioned on

Plaintiff's filing her assent to the remittitur within fifteen (15) days of the date of this Order.

4 Defendant's Motion For A New Trial is DENIED, on condition that Plaintiff assents to remittitur. Should Plaintiff fail to assent to remittitur within the fixed time period, the Court will reconsider the motion *sua sponte* and GRANT it on the issue of damages only.

Done this 23rd day of September, 2003.

/s/ U.W. Clemon
Chief United States District Judge
U.W. Clemon

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

LILLY M. LEDBETTER,	}	
Plaintiff,	}	
	}	
vs.	}	Civil Action Number
	}	**99-C-3137-E**
GOODYEAR TIRE AND	}	
RUBBER COMPANY,	}	
INC.	}	
Defendant.	}	

MEMORANDUM OPINION ON POST-TRIAL MOTIONS

The Jury rendered a $3,843,041.93 verdict in this case, concluding that Plaintiff Lilly M. Ledbetter had proved that Defendant Goodyear Tire and Rubber Company, Inc. ("Goodyear") probably paid her a disparate salary because of her sex. The jury also found that Goodyear did not involuntarily transfer Plaintiff from the position of Area Manager to Technology Engineer because of her age, sex, or in retaliation of her having complained of sex discrimination.

Goodyear has renewed its Motion for Judgment As A Matter of Law, or, in the alternative a New Trial or Remittitur. For the reasons which follow, the Court concludes that 1) Goodyear is entitled to judgment as a matter of law on the claims of retaliation, age, and sex discrimination: and 2) unless the Plaintiff accepts a remittitur, the Motion For A New Trial will be granted.

I

Despite having conclude that Plaintiff's transfer was not unlawful, the jury awarded the sum of $328,597.93 in backpay based on the claims of age and race discrimination and retaliation. The damages award is obviously consistent with the finding of no liability. The consistency was apparent when the jury's special verdict was read in open court. However, Goodyear chose not to challenge the inconsistency before the jury was dismissed. This failure constitutes a waiver of the inconsistency.

Nonetheless, the Court will exercise its discretion to grant Goodyear's renewed motion for judgment as a matter of law solely on these claims which the jury found to be lacking in merit.

II

The jury could reasonably have found that Terry Amberson is an appropriate comparator. Apparently, both he and the Plaintiff were paid the same salary on April 1, 1979, and again on April 16, 1979. Plaintiff's Exhibit ("PX") 201.* The jury could reasonably have concluded that but for the gender discrimination, their salaries would have been the same up to November 1, 1998.

*Goodyear's argument that this exhibit was not received in evidence is without foundation.

It could have found that in the 1996–1998 period, Plaintiff's base annual salary was $44,724; and that Amberson's base annual salary was $59,028.

Plaintiff's charge of discrimination relates back to March 25, 1998, when she completed the Equal Employment Opportunity Commission ("EEOC")'s questionnaire. Because of the continuing nature of the disparate salary payments, Plaintiff is entitled to recover for the disparate salaries from March 25, 1996, until her retirement thirty-one months later.

Assuming that the jury found the facts concerning damages in the most favorable light to Plaintiff that is reasonably could have, the maximum award for the salary

differential would have been $60,000—including overtime pay and prejudgment interest.

The Court concludes therefore that to the extent that the jury's award for the disparate salaries exceed $60,000, it is not supported by the evidence.

III

The jury's award of compensatory damages for mental anguish in the amount of $4,662 is solidly supported by the evidence.

IV

The jury's punitive damage award of $3,258,979 must be reduced.

While the evidence does indeed support an award of punitive damages, the law imposes a limitation on such damages in employment cases such as this one brought under 42 U.S.C. § 1981a. The punitive damages, coupled with the compensatory damages, may not exceed $300,000.00. 42 U.S.C. § 1981a (b) (3) (D).

A reasonable jury could have found $500,00 to be a reasonable amount sufficient to punish and deter Goodyear. Given the statutory limitation and the compensatory damage award, it follows that the punitive damage award must be reduced to $295,338.00.

By separate Order, Goodyear's motion for judgment as a matter of law will be granted on the backpay award only. Its motion for a new trial will be granted solely on the damages issue, unless within fifteen days of the date of this Order, Plaintiff files a declaration of her intent to accept a remittitur of the jury's award to $360,000.00.

Done this 23rd day of September, 2003.

/s/ U.W. Clemon
Chief United States District Judge
U.W. Clemon

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

LILLY M. LEDBETTER,	}	
Plaintiff,	}	
	}	
vs.	}	Civil Action Number
	}	**99-C-3137-E**
GOODYEAR TIRE AND	}	
RUBBER COMPANY,	}	
INC.	}	
Defendant.	}	

MEMORANDUM OPINION ON OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Plaintiff has objected to the Magistrate Judge's Report and Recommendation ("R&R") that summary judgment be granted on her claims of disparate pay, transfer to Technical Engineer, and retaliatory refusal to hire. Based on a review of the R&R, the Court concludes that the objections are meritorious.

First, Plaintiff claims that the R&R erroneously made credibility determinations adverse to her in reaching the conclusion that there are no disputed facts on the disparate pay claim. Defendant's articulated reason for the pay disparity is "her length of service and her relative performance." But several white male employees had significantly shorter lengths of service with Defendant than Plaintiff. On her relative performance, Plaintiff's supervisor,

Mike Tucker, complimented Plaintiff and selected her for "Top Performance" and "Individual Performance" Awards—both of which are given to competent and above average performers. Theses awards resulted in an 8% wage increase for Plaintiff. Tucker recognized that "her [Plaintiff's] rate was less than what we were paying everybody else for doing what they were doing." (Tucker Depo. p. 101). After this lawsuit was filed, Tucker says that he lied and that the real reason for the increase was to bring Plaintiff's salary up to the minimum. The Magistrate Judge apparently credited Tucker's most recent contradictory statements. This was plain error. On a motion for summary judgment, the version of Tucker's explanation most favorable to Plaintiff should have been credited. When it is credited, a genuine issue concerning motive is apparent on the disparate pay claim. Summary Judgment is inappropriate on this claim.

Second, Plaintiff complains that the Magistrate Judge erroneously found that her transfer from the Area Manager position to that Technical Engineer was not an adverse action, based on the consideration that Plaintiff requested the transfer after having been "strongly advised" by her supervisor in light of upcoming layoffs. The Court has considered the difference in the two positions. The Area Manager position is a managerial position which requires less manual labor, and the Technical Engineer is much lower than that of an Area Manager. The Court therefore concludes that a reasonable factfinder may well determine that the differences between the two jobs are objectively serious and tangible enough to alter the terms and conditions of employment, i.e., to constitute an adverse employment action. Further, that evidence shows that Jimmy Todd, Plaintiff's male co-worker with less seniority than Plaintiff, was retained as an Area Manager, was allowed to transfer to Akron, Ohio and remain in management. In sum, the undisputed facts and reasonable inferences arising therefrom do no entitle Defendant to summary judgment on the transfer claim.

Finally, Plaintiff complains that the Magistrate Judge erred when he found no casual link between the failure to rehire Plaintiff and her filing of a charge of discrimination. However, when Don Gardner became Defendant's Employment Manage in May 1998, he learned of Plaintiff's Equal Employment Opportunity Commission charge. Thereafter, he rehired retired male Area Managers, but he denied Plaintiff's request for rehire. This is sufficient to establish a *prima facie* case of retaliation. Summary judgment is likewise inappropriate on this claim.

For the reason stated, Plaintiff's objections to the Magistrate Judge's R&R on disparate pay, transfer to Technical Engineer, and retaliatory refusal to rehire are herby SUSTAINED.

In all other respects, the Court hereby ADOPTS and APPROVES the Magistrate Judge's Report and Recommendation.

Done this 30th day of July, 2002.

/s/ U.W. Clemon
Chief United States District Judge
U.W. Clemon

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

LILLY M. LEDBETTER,	}	
Plaintiff,	}	
	}	
v.	}	**CASE NO.**
	}	**CV 99-JEO-3137-E**
GOODYEAR TIRE AND	}	
RUBBER COMPANY,	}	
INC.	}	
Defendant.	}	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Before the court is the defendant's Motion for Summary Judgment. (Doc. 15).[1] For the reasons set forth below, the court finds that the Motion for Summary Judgment is due to be granted in part and denied in part.

I. FACTUAL BACKGROUND[2]

Plaintiff Lilly M. Ledbetter (the "plaintiff" or "Ledbetter") began working for defendant Goodyear Tire and

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[1] References to "Doc. __" are to the documents as numbered by the clerk of court in the court's record of the case.

[2] The facts set out below are gleaned from the parties' submissions and are viewed in a light most favorable to the plaintiff. They are the "'facts' for summary judgment purposes only. They may not be the actual facts. *See Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1400 (11th Cir. 1994)." *Underwood v. Life Insurance Co. of Georgia*, 14 F. Supp. 2d 1266, 1267 n.1 (N.D. Ala. 1998).

Rubber Co., Inc. (the "defendant" or "Goodyear") at its Gadsden, Alabama tire manufacturing facility on February 5, 1979, as a supervisor trainee. (Pl. Depo. at 25–26, 29).[3] In October 1979, the defendant assigned the plaintiff to a Supervisor position in the Stock Prep Division of the Radial Plant, where she remained until approximately 1981. (*Id.* at 32, 35–36, 38). After that, the plaintiff transferred to a Supervisor position in the Final Finish division of the Radial Plant and worked there until May 15, 1986, when she was laid off based on seniority due to production cutbacks. (*Id.* at 38–40). She then worked at Tyson Foods as a Plant Superintendent for 15 months until the defendant called her back. (*Id.* at 40–41). After her recall, the plaintiff worked as a Supervisor in the control room of what would become known as the defendant's Banbury business center, which manufactures tubes for the tires. (*Id.* at 43, 46). In 1985, the defendant changed the title of Supervisor to "Area Manager" and increased the responsibilities of the position. (Pl. Depo. at 37). At that time, the defendant also created four Business Centers within the Radial Tire Division, including (1) Rubber Mixing, also known as Banbury, (2) Component Preparation, (3) Tire Assembly and (4) Curing/Final Finish.[4] (Doc. 17 at 2).[5]

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[3] The plaintiff's deposition is located in the record at Doc 16, Tab 1.

[4] With respect to its organization, the defendant states as follows:

> Each Business Center is an independent unit with unique functions and separate equipment. The Rubber Mixing Business Center operates the Banbury machines which make the rubber compound, the basic raw ingredients in tires. The Component Preparation Business Center processes the other ingredients for tires. The Tire Assembly Business Center builds the tires. The Curing/Final Finish Business Center cures and inspects the tires, and otherwise prepares them for shipment to the customer.

At the relevant times, each Business Center was managed by a Business Center Manager, who would make raise recommendations for the Area Managers in his Business Center by ranking them according to their "performance appraisals." (Breon Depo. at 29–31).[6] The raises were governed by a merit compensation plan. (*See* Breon Depo. at 21, Ex. 1; Tucker Depo. at Ex. 1).[7] Each Business Center manager was allocated a certain amount of money to be divided between Area Managers, whose annual raises were consequently limited to that amount, as divided by the Business Center Manager. (Breon Depo. at 29–31; Jones Depo. at 216).[8] The raises of Area Managers in one Business Center were thus considered separately from those of Area Managers in other Business Centers.

According to existing records, the plaintiff was consistently ranked at or near the bottom of Area Managers in her Business Center. In 1992, she was ranked in the mid-group of Area Managers. (Tucker Depo at Ex. 4). In 1993, she was ranked sixth out of six Area Managers. (*Id.* at Ex. 5). There are no existing records of a 1994 ranking, but in 1995, the plaintiff was ranked twenty-third out of 24 Area Managers. (Heath Depo. at Ex. 5).[9] She did receive a "Pop Performance Award" and an "Individual Performance Award" in December 1995. (Doc. 21 at Ex. 9).

As a result of declining production at the Gadsden plant from 1995 to 1997, the defendant laid off workers there.

(Doc. 17 at 2).

[5] Document 17 consists of the defendant's memorandum in support of its motion for summary judgment.

[6] Shawn Breon's deposition is located at Doc. 16, Tab 6.

[7] Mike Tucker's deposition is located at Doc. 16, Tab 5.

[8] Jerry Jones's deposition is located at Doc. 16, Tab. 2.

[9] Don Heath's deposition is located at Doc. 16, Tab. 4.

(Jones Depo. at 75–76; Gardner Depo. at 28).[10] In January, 1997, Business Center Manager Jerry Jones told the plaintiff and another Area Manager, Jimmy Todd, that they would be laid off. (Pl. Depo. at 110, 113, 117–18; Jones Depo. at 62). Jones was told that both employees were to be laid off, so that there was no need to do their evaluations. (Jones Depo. at 72–74). Both continued to work, however, due to subsequent extended absences of other Area Managers. (Jones Depo. at 62). On July 21, 1997, Jones informed the plaintiff that her performance was unacceptable and that she must "do something different." (Pl. Depo. at 91; Jones Depo. at Ex. 1 p. D-00917). He mentioned that she had been slated for lay-off because of her performance. (*Id.*).

At Jones's suggestion, the plaintiff interviewed for the position of Technology Engineer, was selected and transferred on January 5, 1998.[11] (Pl. Depo. at 104–05; Complaint at ¶¶ 6, 19). From January 6, 1998 to January 25, 1998, the plaintiff took part in an informal training program, receiving approximately 120 hours in training. (*See* Doc. 21 at Tab. 9). After discussing her training with Technical Team Leader Ross Hotz, the plaintiff was assigned to her own shift on January 26, 1998. (*Id.*).

On February 19, 1998, the defendant had to scrap approximately 200 tires because the plaintiff and two male employees each failed to perform a specific function of their job. (Heath Depo. at 203, Ex. 8). In the plaintiff's case, she had failed to check the set-up on a curing press, and the tires were cured with the sidewall installed upside down. (Heath Depo. at 199, Ex. 8). Each of the three employees responsible were suspended for three days. (Pl. Depo. at 234).

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[10] Don Gardner's deposition is located at Doc. 16, Tab. 3.

[11] Jones alleges that he made this suggestion because the plaintiff was still slated to be laid off as Area Manager. (Jones Depo. at 248–49).

In the fall of 1998, the defendant offered a voluntary layoff program. (Pl. Depo. at 399–401). The plaintiff applied for voluntary layoff under this program, and the defendant accepted her application, with her retirement effective on November 1, 1998. (Plaintiff Depo. 411–13; Gardner Depo at Ex. 1). At the time of her layoff, the plaintiff accepted a lump-sum payoff and retired. (Gardner Depo. at 60, 65).

On March 25, 1998, the plaintiff filed responses to a charge questionnaire with the Equal Employment Opportunity Commission ("EEOC") (Pl. Depo. at Ex. 23). In those responses, she made allegations of employment discrimination against the defendant. (*Id.*). On July 21, 1998, the plaintiff filed a Charge of Discrimination against the defendant, alleging that the defendant committed illegal employment discrimination on the basis of sex and age in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and the Age Discrimination in Employment Act of 1967 ("ADEA"). (*Id.* at Ex. 24). The plaintiff then filed a Supplemental Charge of Discrimination in which she alleged that the defendant had retaliated against her for filing her previous Charge of Discrimination. (*Id.* at Ex. 25).

The plaintiff filed this action on November 24, 1999, alleging violations of Title VII, the ADEA, and the Equal Pay Act ("EPA"), 29 U.S.C. §§ 206(d) and 215(a)(3). (Doc. 1).

II. SUMMARY JUDGMENT STANDARD

Summary judgment is to be granted only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the declarations, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The party asking for summary judgment "bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. Only when that burden has been met does the

burden shift to the nonmoving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970).

The movant can meet this burden by presenting evidence showing there is no dispute of material fact, or by showing that the nonmoving party has failed to present evidence in support of some element of his case on which he bears the ultimate burden of proof. *Celotex*, 477 U.S. at 322–23; *See* FED. R. CIV. P. 56(a) and (b). Once the moving party has met his burden, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by . . . affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324. The nonmoving party need not present evidence in a form necessary for admission at trial; however, the movant may not merely rest on the pleadings. *Id.*

After a motion has been responded to, the court must grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). Rule 56(c) mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322.

The substantive law will identify which facts are material and which are irrelevant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. A judge's guide is the same

standard necessary to direct a verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 259; *See Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 745 n.11, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983). *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 643 (11th Cir. 1997). However, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Anderson*, 477 U.S. at 249 (citations omitted); *accord Spence v. Zimmerman*, 873 F.2d 256 (11th Cir. 1989). Furthermore, the court must "view the evidence presented through the prism of the substantive evidentiary burden," so there must be sufficient evidence on which the jury could reasonably find for the plaintiff. *Anderson*, 477 U.S. at 254; *Cottle v. Storer Communication, Inc.*, 849 F.2d 570, 575 (11th Cir. 1988). Nevertheless, credibility determinations, the weighing of evidence, and the drawing of inferences from the facts are the function of the jury, and therefore the evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his favor. *Anderson*, 477 U.S. at 255. The nonmovant need not be given the benefit of every inference but only of every reasonable inference. *Brown v. City of Clewiston*, 848 F.2d 1534, 1540 n.12 (11th Cir. 1988). "If reasonable minds could differ on the inferences arising from undisputed facts, then a court should deny summary judgment." *Allen*, 121 F.3d at 643.

III. DISCUSSION

A. Title VII and ADEA Claims

1. Claims Allegedly Barred by the Failure to file a Timely EEOC Charge

The defendant claims that the plaintiff did not timely file a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") encompassing her claims that, during her term as Area Manager, she suffered sex and age discrimination when she (1) received lower pay than other Area Managers (Complaint at ¶¶ 14, 33), and (2) received a review for 1997 that inaccurately characterized her performance as poor (Complaint at ¶ 16).[12] *See Chanda v Engelhard/ICC*, 234 F.3d 1219 (11th Cir. 2000) (the filing of an administrative complaint with the EEOC within 180 days of the challenged employment action is a jurisdictional prerequisite to a Title VII or ADEA action). The defendant argues that it is therefore due summary judgment on those claims.

The plaintiff argues that she met this jurisdictional prerequisite by filing a charge questionnaire with the EEOC within 180 days of the challenged employment action, followed by the filing of a Charge of Discrimination and, later, a Supplemental Charge with the EEOC. The last two of these filings should, she alleges, be treated as supplements to the claims set forth in her responses to the Charge Questionnaire and should therefore be treated as relating back to the filing thereof.

The defendant does not dispute that the charge questionnaire can be treated as a Charge of Discrimination, and the court will treat it as such for the purposes of this

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[12] The plaintiff has voluntarily relinquished her claims that she received less overtime than other Area Managers (Complaint at ¶ 15) and that she was not invited to certain business meetings (Complaint at ¶¶ 17–18). (Doc. 22 at 29, n.19).

analysis.[13] Rather, the defendant asserts that none of the allegations in this case regarding the terms and conditions of the plaintiff's employment as an Area Manager are included only in the charge questionnaire, and that the pay allegations are untimely because they were included in the Charge of Discrimination, which was filed after the 180-day limit. (Doc. 26, citing Pl. Depo. at Ex. 23, p.1).

The charge questionnaire included the question, "[w]hat action was taken against you that you believe to be discriminatory? What harm, if any, was caused to you or others in your work situation as a result of that action?" In response, the plaintiff wrote as follows:

> Transferred to Tech. Eng. (Quality) from Production Area Manager. 2nd week on job missed wrong spec. provided for code change which resulted in some scrap. Goodyear made decision to lay-off myself, Area Manager W. Scott and Union Set-up J. Smith. There were 133 tire holds—resulting in scrap in 1997—no lay-offs. W. Scott is a black man [and] I am a white female they are making an example of. Examples—3/5/97—R. Artledge turned power off result—300+ scrap and could have killed someone.

(Doc. 16 at Ex. 23).

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[13] The court assumes that the plaintiff's responses to the charge questionnaire meet the requirements of a charge, since the defendant essentially concedes this point. The court notes that the Eleventh Circuit recently found that determining whether the intake questionnaire can function as a charge requires the court to answer the following question: "Would the circumstances of this case convince a reasonable person that [the plaintiff] manifested her intent to activate the machinery of Title VII by lodging her intake questionnaire with the EEOC?" *Wilkinson v. Grinnell Corp.*, 270 F.3d 1314 (11th Cir. 2001).

The other question in the charge questionnaire was "[w]hy do you think this action was taken against you?" In response, the plaintiff wrote as follows:

> Goodyear Representative told me last Oct. (1997) that they did not want me and that I was not getting job done. I ask for production record comparison of my crew vs my peers but they could not provide them. Later they advised me I needed to transfer to Tech. Dept. [and] sent me for interview. They trained me—if putting me with an individual that was told in his evaluation if they could lay someone off it would be him. The procedure on checking specs wasn't covered in training. The action of being only one (and W. Scott) being laid off which all the "Good Ole White Boys" [h]ave not been laid off. I ask to treat me the same as the others involved in the tire holds.

(Doc. 16 at Ex. 23).

In her subsequent Charge of Discrimination, the plaintiff alleges as follows:

> On July 20, 1998, I was suspended from my position as technical engineer for three days due to an error that was placed in the computer by an area manager, and was passed on to me to act upon it. I was transferred involuntarily from an area manager's position on January 5, 1998, to the position as technical engineer. At the time that I was transferred, I learned that the male area managers were earning a higher salary than me. I am also being paid less wages than similarly situated technical engineers who are males. On a continuous basis, I have been subjected to adverse terms and conditions of employment, in that since my transfer, my male co-workers have made comments to me that I

> am a trouble maker and they have to watch out for me. Younger male employees who have made errors and cost the company economically, have not been suspended as I presently have been. I was given four weeks training by three male employees, only on the job duties that they performed during their shifts. I was not given a job description nor a traning manual for the technical engineer position. The on-the-job training that I received was far short of being comprehensive.
>
> I was informed by Ross Hotz, TTL Final Finish, that I had made a terrible error and that I had to be laid off for three days. I inquired why, when others have made errors and nothing happened to them. Mr. Hotz stated that they have not been consistent in the way they discipline, but that he was trying to start making it consistent.

(Doc. 16 at Ex. 24).

Regulatory law allows a timely-filed charge to be amended for technical defects at a later date while retaining the original filing date. "Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received." 29 C.F.R. § 1601.12(b). For the purposes of this analysis, the court will assume that the Charge of Discrimination meets this requirement and that it therefore relates back to the date the plaintiff filed responses to the charge questionnaire.

The plaintiff's "judicial complaint is limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination [and the responses to the charge questionnaire]." *Mulhall v. Advance Security, Inc.*, 19 F.3d 586, 589 n. 8 (11th Cir.), *cert. denied*, 513 U.S. 919, 115 S. Ct. 298, 130 L. Ed. 2d 212 (1994). Judicial claims

which serve to amplify, clarify, or more clearly focus earlier EEO complaints are appropriate. Allegations of new acts of discrimination, offered as the essential basis for the requested judicial review are not appropriate. *Wu v. Thomas*, 863 F.2d 1543, 1547 (11th Cir. 1989), *cert. denied*, 511 U.S. 1033, 114 S. Ct. 1543, 128 L. Ed. 2d 195 (1994) (citation omitted).

After reviewing the allegations contained in the plaintiff's responses to the charge questionnaire and in the Charge of Discrimination, the court concludes that the review and pay claims are within the scope of an EEOC investigation which can reasonably be expected to grow out of the charges and the questionnaire responses.[14] The court therefore declines to find that those claims are due to be barred.

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[14] The pay claims are stated with reasonable clarity in the Charge of Discrimination, and would therefore be within the scope of an EEOC investigation thereof. The review claims are not stated as clearly in the questionnaire responses. With respect to the claim that a review for 1997 inaccurately characterized her performance, the court notes that the plaintiff mentions in her questionnaire responses that, in October 1997, an unnamed representative of the defendant told her that " they did not want [her] and that [she] was not getting job done." (Doc. 16 at Ex. 23). She also alleges that she asked for, but did not receive, production records in order to compare the work of her crew to those of her peers. According to the complaint, "[i]n January of 1998, the plaintiff received a discriminatory evaluation in which she received a low score while men performing the same job in the same manner as she received a higher evaluation score." (Complaint at ¶16).

Given these allegations, the plaintiff's claims regarding an allegedly inaccurate formal evaluation score in January, 1998, appear to be within the scope of the investigation that would reasonably be expected to grow out of the charge/questionnaire responses. The responses point to an unidentified "representative" making statements about her productivity and her desirability as an employee, without offering records to support such a contention. Further inquiry into the defendant's evaluation of the plaintiff's

2. Title VII and ADEA Analysis

The appropriate framework from which to evaluate the plaintiff's claim of disparate treatment under Title VII is specified in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04, 93 S. Ct. 1817, 1824–25, 36 L. Ed. 2d 668 (1973), as the claim is based upon circumstantial evidence. *Jones v. Bessemer Carraway Medical Center*, 137 F.3d 1306, 1310–11 (11th Cir.), *superseded in part on other grounds*, 151 F.3d 1321 (11th Cir. 1998). The plaintiff has the initial "burden of establishing a prima facie case of [gender] discrimination." *McDonnell Douglas*, 411 U.S. at 802.

In *Maniccia v. Brown*, 171 F.3d 1364, 1368 (11th Cir. 1999), the Eleventh Circuit Court of Appeals stated:

> To establish a prima facie case of disparate treatment, Appellant must show: (1) she is a member of a protected class; (2) she was subjected to adverse employment action; (3) her employer treated similarly situated male employees more favorably; and (4) she was qualified to do the job.

Maniccia, 171 F.3d at 1368. The same framework, modified slightly, applies to the plaintiff's ADEA claims. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141–42, 120 S. Ct. 2097, 2105, 147 L. Ed. 2d 105 (2000) (recognizing widespread application of *McDonnell Douglas* framework to ADEA claims).

If a prima facie case is shown, the defendant must "articulate some legitimate, nondiscriminatory reason for the [adverse employment action]." *McDonnell Douglas*, 411 U.S.

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performance would be reasonably expected to grow out of these allegations.

The defendant argues that the charge questionnaire responses show that the plaintiff's claims are limited to those related to her transfer and suspension. The court finds the defendant's reading of the charge questionnaire responses to be unduly narrow.

at 802, 93 S. Ct. at 1824. If this is done, the plaintiff is required to show that the proffered reason was merely a pretext for the defendant's acts. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 1093, 67 L. Ed. 2d 207 (1981). "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.*

a. Transfer to Position of Technology Engineer

The plaintiff claims that the defendant committed illegal gender and age discrimination by transferring her from the position of Area Manager to the position of Technology Engineer. Yet, the plaintiff claims that she interviewed for and accepted the offer of the Technology Engineer job after her superior, Business Center Manager Jerry Jones, strongly suggested that she do so. It appears that her complaint is not actually about the transfer, which was done at her own instigation, but rather about the fact that Jones strongly suggested that she seek the transfer. It is highly doubtful that the suggestion of a superior for an employee to apply for a transfer could be characterized as an adverse employment action. *See Gupta v. Florida Board of Regents*, 212 F.3d 571, 587 (11th Cir. 2000), *cert. denied*, 531 U.S. 1076, 121 S.Ct. 772, 148 L. Ed.2d 671 (2001) (conduct falling short of an ultimate employment decision is not an adverse employment action unless it is objectively serious and tangible enough to alter the terms and conditions of employment).

Even if Jones's suggestion or the transfer itself could be characterized as an adverse employment action, it is not clear that the defendant treated similarly situated younger men more favorably. The court notes that, when Jerry Jones and Pete Buchanan told the plaintiff that she was slated to be laid-off, she made a point of telling them that she needed to work for a while longer before she retired. (Pl. Depo. at 115–16). Jerry Jones noted the plaintiff's impending lay-off before he

discussed the Technology Engineer opening with her. (Jones Depo. at 248–49). There is no evidence that the defendant suggested to any younger male Area Manager slated for lay-off apply that he should apply for a more favorable position than the Technology Engineer job. There is no evidence that the defendant transferred such a younger male employee who was facing a lay off to a better position.

The court finds that the plaintiff has failed to prove a prima facie case as to this claim. The defendant's motion for summary judgment is therefore due to be granted with respect to it.

b. Training for the Position of Technology Engineer

The plaintiff complains that the defendant committed illegal employment discrimination by inadequately training her for the position of Technology Engineer. She complains that she received no training and that "there was no job procedure manual or written job description available" to her. (Complaint at ¶ 27). As the defendant points out, however, the plaintiff does not demonstrate that younger males were trained any differently for the position of Technology Engineer than was she.

The plaintiff alleges that she received "informal training," which consisted of her following three other Technology Engineers around and observing them. (Doc. 22 at 43). She claims that, after her October 1, 1998 retirement date, the defendant asked her to train her younger male replacement, and that she did so for a month. (Doc. 22 at 43; Doc 21 at Tab 39, ¶¶ 8, 10). She does not, however, specify anything about her replacement's training that was substantially different from her own training. In fact, she testified at her deposition that "[the defendant] went ahead and put down my vacation in October because I never really worked a day. I had—I don't think I ever worked a day in October. It was just vacation pay." (Pl. Depo. at 409–10). From this testimony, it appears that, if the plaintiff was indeed

supposed to train her replacement during the month following her retirement, then she failed to do so.[15]

Since the plaintiff has not demonstrated that the defendant treated similarly situated younger males more favorably than it treated her with respect to training for the Technical Engineer position, she cannot establish a prima facie case. The defendant's motion for summary judgment is therefore due to be granted as to this claim.

c. Plaintiff's Suspension

The plaintiff claims that the defendant committed illegal employment discrimination when it gave her a three-day suspension. (Complaint at ¶¶ 28, 34). She claims that similarly situated employees outside the protected class were not suspended.

In 1998, the plaintiff and two male employees (William Scott and Jimmie Smith) were suspended because they were responsible for a "tire hold"—a manufacturing error that caused approximately 200 tires to be scrapped. The ruined tires were cured with the sidewall installed upside down because the plaintiff allegedly failed to check the set-up of the curing presses. (Heath Depo. at 199, Ex. 8). The plaintiff argues that many male employees who were responsible for tire holds were never disciplined. (Doc. 22 at 23–24, 44).[16]

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[15] However, in her affidavit, she states that she trained her replacement after her retirement date. (Doc. 21, Ex. 40, ¶ 10).

[16] The plaintiff also argues that the defendant wrongly attributed this production error to her. (*Id.* at 23). The court finds this argument unpersuasive and untimely. The plaintiff states that Area Manager Steve Thompson was "likely responsible" for the tire hold because the hold occurred after Thompson took over the plaintiff's position in Tire Assembly, at the machine where the error allegedly occurred. (Doc. 22 at 23). There is no evidence that the plaintiff complained about the attribution of this error at the time it was attributed to her or when she was disciplined for it. Her first complaint about it seems to have been in the briefing of this motion.

For the purposes of this analysis, the court will assume that the plaintiff has met the burden of establishing a prima facie case. The defendant does not argue otherwise, but asserts instead that the plaintiff cannot show that the legitimate, non-discriminatory reason offered by the defendant is pretextual.

In discussing the burden that must be met by the plaintiff to show pretext, the Eleventh Circuit stated as follows:

> When deciding a motion by the defendant for judgment as a matter of law in a discrimination case in which the defendant has proffered nondiscriminatory reasons for its actions, the district court's task is a highly focused one. The district court must, in view of all the evidence, determine whether the plaintiff has cast sufficient doubt on the defendant's proffered nondiscriminatory reasons to permit a reasonable factfinder to conclude that the employer's proffered "legitimate reasons were not what actually motivated its conduct," *Cooper-Houston v. Southern Ry. Co.*, 37 F.3d 603, 605 (11th Cir. 1994) (citation omitted). The district court must evaluate whether the plaintiff has demonstrated "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Sheridan*, 100 F.3d [1061,] 1072 [*cert denied*, 521 U.S. 1129, 117 S.Ct. 2532, 138 L. Ed. 2d 1031 (1997),] (citation and internal quotation marks omitted); *see also Walker*, 53 F.3d [1548,] 1564 [(1995)] (Johnson, J., concurring) (discussing methods of proving pretext). However, once the district court determines that a reasonable jury could conclude

> that the employer's proffered reasons were not the real reason for its decision, the court may not preempt the jury's role of determining whether to draw an inference of intentional discrimination from the plaintiff's prima facie case taken together with rejection of the employer's explanations for its action. At that point, judgment as a matter of law is unavailable.

Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997), *cert. denied*, 522 U.S. 1045, 118 S. Ct. 685, 139 L. Ed. 2d 632 (1998).

The defendant asserts that the plaintiff was suspended because she was responsible for the tire hold. As evidence that this reason is pretextual, the plaintiff argues that male employees had been responsible for tire holds in the past, but were not disciplined. (Doc. 22 at 44). She states as follows:

> For example, Norris Warren was responsible for a large tire hold on an earlier date but was not laid off. (Ledbetter Depo., at 343–344). In 1997, Area Manager Steve Thompson approved two rolls of the wrong sidewall for a batch of tires resulting in a tire hold, but Thompson was not disciplined. (Ledbetter Depo., at 345). Area Manager Jeff Cheatwood changed the tags on stock resulting in a tire hold and was not laid off. (Ledbetter Depo., at 346).

(Doc. 22 at 44).

The defendant argues that the Production Manager, Don Heath, was involved in the decision to suspend the plaintiff, and that any disciplinary actions taken before his tenure as Production Manager began are irrelevant. The Eleventh Circuit has stated as follows:

> [D]ifferences in treatment by different supervisors or decision makers can seldom be the basis for a viable claim of discrimination.

> *See Jones v. Gerwens*, 874 F.2d 1534, 1541 (11th Cir. 1989) ("Courts have held that disciplinary measures undertaken by different supervisors may not be comparable for purposes of Title VII analysis."); *Cooper v. City of N. Olmsted*, 795 F.2d 1265, 1271 (6th Cir. 1986) ("Although a change in managers is not a defense to claims of race or sex discrimination, it can suggest a basis other than race or sex for the difference in treatment received by two employees."); *Bessemer*, 137 F.3d at 1312 n. 7 ("Different supervisors may have different management styles that—while not determinative—could account for the disparate disciplinary treatment that employees experience."); *Tate v. Weyerhaeuser Co.*, 723 F.2d 598, 605–06 (8th Cir.1983) (fact that one manager may be more lenient than another may explain the different treatment that employees receive on a non-racial basis).

Silvera v. Orange County School Bd., 244 F.3d 1253, 1261 n.5 (11th Cir. 2001).

The evidence does not clearly reflect Heath's role in the decision-making process with respect to the plaintiff's suspension. Former Plant Manager Richard O'Dell testified that "discipline issues normally start with the department head," and that "normally [discipline] is at the division level." (O'Dell Depo. at 51). There is not sufficient evidence to permit the court to disregard disciplinary incidents that occurred outside of Heath's tenure as Production Manager.

The defendant further argues that, in order to prevail on this claim, the plaintiff must show that "Goodyear honestly believed that another employee was at fault for an occurrence similar to the plaintiff's, yet failed to discipline the employee." (Reply Memorandum in Support of Motion for Summary Judgment at 5). The defendant argues that the

plaintiff has presented no evidence that "Goodyear believed that any employee was at fault for a production error who was not suspended." *Id.*

In reviewing the passages the plaintiff cites from her deposition, it appears that she offers sufficient evidence of pretext to avoid summary judgment as to this claim. In other words, she has demonstrated "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Combs*, 106 F. 3d at 1538. She cites several incidents in which men who were responsible for mistakes leading to tire holds were treated more favorably than she was treated in sufficiently similar circumstances. Although the defendant attempts to distinguish responsibility for "tire holds" with responsibility for "production errors," the court is not convinced that such a distinction prevents that plaintiff from showing that there is a genuine issue of material fact as to whether the legitimate, non-discriminatory reason offered by the defendant is pretextual. The defendant's motion for summary judgment is therefore due to be denied as to this claim.

d. Disparate Pay Claim

The plaintiff claims that the defendant committed illegal gender and age discrimination by paying her less than those outside the protected class who did similar work. Specifically, she complains that she was paid lower wages than were other Area Managers. (Doc. 22 at 39-41).

The defendant does not dispute that the plaintiff has established a prima facie case with respect to her Title VII pay claims, but it offers, rather, a legitimate, non-discriminatory reason for the pay disparity between the plaintiff and those outside the class. The defendant argues that the plaintiff was paid less than other Area Mangers because of "her length of service and her relative performance." (Doc. 26

at 9). The plaintiff contends that the proffered legitimate, nondiscriminatory explanation is a pretext for discrimination.

In attempting to meet the *Combs* standard set forth hereinabove, the plaintiff states that the proffered reason is unworthy of credence for the following reasons:

> First, Ledbetter's performance was good in 1992 when she was awarded a transfer to the Radial Light Truck department. Mike Tucker was her supervisor that year and testified that her performance improved from 1992 to 1996 while he was her business center manager. She received a Top Performance award in 1995 and was not evaluated or ranked in 1996. Ledbetter never received a low evaluation until after she complained of discrimination in July of 1997 to [Business Center Manager] Jerry Jones, who was responsible for the information provided in her performance evaluation. Moreover, Production Auditor Mike Maudsley, who had a bias against Ledbetter, performed her audits for the first time in 1996 and 1997.

(Doc. 22 at 41).[17]

The defendant replies that "Tucker considered the plaintiff's performance to be relatively low" and that "Tucker gave her a low review in 1995 and ranked her 23 out of 24

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[17] Of Maudsley, the plaintiff states as follows:

> Mike Maudsley became Ledbetter's auditor in 1996. Maudsley had a history of quid pro quo sexual offers to Ledbetter when he was her supervisor in the early 1980's. He also had propositioned her in 1996 and she denied him. Moreover, Ledbetter asked Maudsley why he treated her differently, and he responded that she could not cuss him as hard as the men do and that it is easier to write her up than the men. (Ledbetter Depo., at 315–16).

(Doc. 22 at 41, n. 21).

Area Managers based on her performance in 1995." (Doc 26 at 9, citing Heath Depo. at Ex. 5). The defendant also points out that the plaintiff was slated to be laid off in 1996 because of her low performance. (*Id.* at 62–64). The defendant argues that "[b]ecause the Plaintiff cannot show that the defendant did not honestly believe her performance was relatively low, any viable disparate pay claim should be dismissed as a matter of law." (*Id.* at 10).

Under the *Combs* standard, it appears that the evidence presented by the plaintiff has not "cast sufficient doubt on the defendant's proffered nondiscriminatory reasons to permit a reasonable factfinder to conclude that the employer's proffered 'legitimate reasons were not what actually motivated its conduct.'" *Cooper-Houston*, 37 F.3d at 605. Goodyear presented evidence that the plaintiff's performance was ranked at or near the bottom of Area Managers in her Business Center in 1992, 1993 and 1995.[18] (Pl. Depo. at Ex. 13; Tucker Depo. at Ex. 5; Heath Depo. at Ex. 5). Goodyear also presented testimony that the plaintiff was low in seniority in comparison with other Area Managers. (Jones Depo. at 46–47).[19] Although the plaintiff offered evidence that she received a transfer to a desirable position because of her good performance in 1992, this does not cast sufficient doubt on Goodyear's proffered reasons for the plaintiff's lower pay so as to permit her to meet the *Combs* standard. (Pl. Depo. at 55–56, Ex. 1).

The plaintiff relies heavily on evidence that her supervisor was complimentary of her performance and gave her a "Top Performance Award" and an "Individual

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[18] Although the plaintiff complains that her 1996 and 1997 audits were performed by Maudsley, who she claims was biased against her, she points to no evidence as to how these audits were deficient or inaccurate or how any problem with the audits might have impacted her pay.

[19] The Jones Depo. is located at Doc. 16, Ex. 2.

Performance Award" in 1995. (Doc. 21 at Ex. 9). The "Top Performance Awards" are merit-based salary increases given "for only the highest level of individual performance and contribution in an organization" and are "limited to not more than 30% of the number of salaried associates in an organization." (Doc. 21 at Ex. 11) (emphasis in original). But the defendant presented testimony that there is, in practice, some flexibility to use these awards to adjust the pay of boost the pay of employees whose salary is lower than the given range for their work, regardless of their performance. (Heath Depo, at 80–81). In fact, the plaintiff's supervisor testified that the awards given to the plaintiff in 1995 were given for that very reason—the plaintiff's pay was below the minimum of the appropriate range for her job, so her supervisor wanted to bring her pay within that range. (Tucker Depo. at 61–63).

The plaintiff's supervisor testified that he told the plaintiff that she received these awards for her good performance, although this was not true. (Tucker Depo. at 177–78). Instead, it was sued to bring her salary up to the minimum. (*Id.*). He also testified that he complimented the plaintiff on her performance even though he had significant problems with how she performed. (Tucker Depo. at 63–65). The plaintiff's low performance rankings confirm the supervisor's testimony that the plaintiff's awards were not given for merit and that he misrepresented his opinion of her performance when he discussed it with her. The court also notes that other testimony indicates that the plaintiff had performance problems. (Jones Depo. at 142–43, 157–59).

It thus appears that the evidence offered by the plaintiff has not "cast sufficient doubt on the defendant's proffered nondiscriminatory reasons to permit a reasonable factfinder to conclude that the employer's proffered 'legitimate reasons were not what actually motivated its conduct.'" *Combs*, 106 F.3d at 1538 (citing *Cooper-Houston*, 37 F.3d at 605). Summary judgment is therefore due to be granted with respect to the plaintiff's disparate pay claim.

e. Constructive Discharge

"The threshold for establishing constructive discharge in violation of [Title VII] is quite high." *Hipp v. Liberty National Life Insurance Co.*, 252 F.3d 1208, 1231 (11th Cir. 2001), *cert. denied*, 2002 WL 232923 (Feb. 19, 2002). "To successfully claim constructive discharge, a plaintiff must demonstrate that working conditions were so intolerable that a reasonable person in [her] position would have been compelled to resign." *Id.* (quoting *Poole v. Country Club of Columbus, Inc.*, 129 F.3d 551, 553 (11th Cir. 1997) (quoting *Thomas v. Dillard Department Stores, Inc.*, 116 F.3d 1432, 1433–34 (11th Cir. 1997))) (internal quotations omitted); *see also Graham v. State Farm Mutual Insurance Co.*, 193 F.3d 1274, 1284 (11th Cir. 1999) (citing *Morgan v. Ford*, 6 F.3d 750, 755 (11th Cir. 1993)); *Wardwell v. School Board of Palm Beach County*, 786 F.2d 1554, 1557 (11th Cir. 1986). "Before finding a constructive discharge, this court traditionally require[s] a high degree of deterioration in an employee's working conditions, approaching the level of 'intolerable.'" *Hill v. Winn-Dixie Stores, Inc.*, 934 F.2d 1518, 1527 (11th Cir. 1991) (citing *Wardwell*, 786 F.2d at 1558 (holding that an employer's failure to promote and consequent embarrassment to employee, together with employee's added workload, "simply do not rise to the intolerable level at which a reasonable person would feel compelled to resign")). Because the court must employ an objective, reasonable person standard, the plaintiff's subjective feelings are not determinative. *Graham*, 193 F.3d at 1284 (citing *Doe v. Dekalb County School Dist.*, 145 F.3d 1441, 1450 (11th Cir. 1998)). The Eleventh Circuit has further held that "[p]art of an employee's obligation to be *reasonable* is an obligation not to assume the worst, and not to jump to conclusions too fast." *Garner v. Wal-Mart Stores, Inc.*, 807 F.2d 1536, 1539 (11th Cir. 1987) (italics in original).

The plaintiff states that the defendant put her in a position where she needed to maneuver heavy tires from one

truck to another without assistance. She states that this was an unbearable physical difficulty that led her to take early retirement as a way out of the hardship imposed on her. (Doc. 22 at 19–21, 48). The record reflects that the plaintiff voluntarily applied for the Technology Engineer position, although it is true that she received a strong recommendation to apply for it, as an alternative to being laid off.[20] She chose to take advantage of that recommended alternative. The evidence also reflects, and the plaintiff readily acknowledges, that she was able to perform the job, although it may have been unpleasant and strenuous for her to do so. In fact, she was able to perform the job for the better part of 1998. The evidence does not support the plaintiff's constructive discharge claim. The defendant's motion for summary judgment is thus due to be granted with respect to this claim.

f. Equal Pay Act

The Equal Pay Act ("EPA"), 29 U.S.C. § 206(d), prohibits all gender-based wage discrimination in employment. To establish a *prima facie* case under the EPA, the plaintiff must demonstrate that the defendant paid a different wage to a male comparator than it did to her for equal work on a job, the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. *Meeks v. Computer Assoc. Int'l.*, 15 F.3d 1013, 1018 (11th Cir. 1994) (citing *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1532 (11th Cir. 1992).

If the plaintiff establishes a prima facie case, the burden then shifts to the defendant to demonstrate that the differential was justified under one of the four affirmative defenses found in 29 U.S.C. § 206(d)(1), including, in pertinent part, that the pay differential was "based on any factor other than sex." *Mulhall*, 19 F.3d at 590. The burden is a "heavy one,"

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[20] As is set forth above, the plaintiff was scheduled to be laid off.

Mulhall, 19 F.3d at 590, because the "defendant[] must show that the factor of sex provided no basis for the wage differential." *Id.* If the defendant meets its burden, the plaintiff must then rebut the explanation for the differential by showing with affirmative evidence that it is pretextual or offered as a post-event justification. *Irby v. Bittick*, 44 F.3d 949, 954 (11th Cir. 1995).

Initially, the defendant argues that the plaintiff's EPA claim is barred by the applicable statute of limitations. Under 29 U.S.C. § 255(a), it argues, the statute of limitations for such claims is two years, or three years for a willful violation. As this suit was filed on November 24, 1999, the defendant argues that it is "unqualifiedly entitled to judgment as a matter of law as to all claims regarding matters which occurred prior to November 24, 1996." (Doc. 17 at 14). Accordingly, the defendant has declined to address matters arising before that date. (*Id.*). The plaintiff does not challenge this argument. The court will therefore decline to address claims regarding matters which occurred prior to November 24, 1996. (Doc. 22 at 48–59)

1. EPA Claims as to the Area Manager Position

The defendant argues that, for the purposes of the EPA, the plaintiff has no comparators among the Area Managers, except for those who worked in the Business Center where she worked. It argues that the Area Managers who worked in different Business Centers did not hold jobs requiring equal skill, effort and responsibility, which were performed under similar working conditions, so as to satisfy the requirements of 29 U.S.C. § 206(d). The defendant also points out that the Eleventh Circuit has held that "[t]he standard for determining whether jobs are equal in terms of skill, effort and responsibility is high," and that "the jobs involved must be

substantially identical or equal." *Waters v. Turner, Wood & Smith Ins. Agency, Inc.*, 874 F.2d 797, 799 (11th Cir. 1989).[21]

The plaintiff argues that all the Area Managers at the plant should be considered her comparators for EPA purposes. She states as follows:

> The job description is the same for all Area Managers at the Gadsden Goodyear plant. The purpose of an Area Manager is to "plan, organize and direct all activities for all production and maintenance functions within a specific area of the plant consistent with total quality manufacturing environment." (Ex. 42, Area Manager Position Description). The job description does not differentiate between the duties or major responsibilities of Area Managers. Each Area Manager supervises from 25 to 50 union employees. (Ex. 42). The plaintiff worked in Tire Assembly along with over twenty other Area Managers.

(Doc. 22 at 50).

Each of the defendant's Business Centers had a particular purpose, and made different products. That necessarily means that the duties of workers and Area Managers in one Business Center varied somewhat from workers and Area Managers in another Business Center. For instance, the plaintiff stated that she had to learn the exact procedure for building tires when she went to the Radial Light Truck division, because some of those she would be managing had never built tires before. (Pl. Depo. at 76–77). She also said that her lack of machine knowledge held her back in the RLT area. (*Id.* at 215) . It thus appears that some specialized skill was required for Area

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[21] Since *Waters*, the Eleventh Circuit has held that the jobs held by the employees of opposite sexes need not be identical; rather, they need only be substantially equal. *Miranda*, 975 F.2d at 1533.

Managers to supervise employees in the different business centers, even in the plaintiff's own experience. In addition, the employees in different business centers were ranked against each other, rather than against employees in all the business centers. (Doc. 16, Tab 4 at 178–80).

Given such evidence, the court is not satisfied that the plaintiff has established a prima facie case with respect to Area Managers outside the Business Center in which she worked. In other words, the court is not satisfied that the plaintiff has shown that the performance of her Area Manager job required "equal skill, effort, and responsibility" as Area Managers in other Business Centers or that their duties were performed under similar working conditions. *Meeks*, 15 F.3d at 1018. The court is satisfied that the plaintiff has established a prima facie case with respect to the EPA claims involving Area Managers in her own Business Center as comparators.

Since the plaintiff has presented evidence that she was paid a lower wage than all the other Area Managers, including her comparators, the Area Managers in her Business Center, she establishes a prima facie case under the EPA. The burden thus shifts to the defendant, which attempts to meet the heavy burden of demonstrating that the differential was "based on any factor other than sex," and that "the factor of sex provided no basis for the wage differential." *Mulhall*, 19 F.3d at 590.

The defendant argues that any income disparity between the plaintiff and her comparators is attributable to factors other than sex. First, the defendant points to evidence reflecting that the plaintiff had worked for the defendant for less time than her comparators, (Jones Depo. at 46–47), so she had fewer opportunities to be considered for pay increases than did her comparators. The court notes, however, that there is also evidence, discussed elsewhere herein, that the plaintiff's performance was weak in relation to that of her comparators, with whom she competed for scarce salary-increase funds. So, in a sense, longer employment would give

the plaintiff more opportunities to fall further behind her comparators in terms of income. At any rate, the court thus finds the length-of-service arguments to be of limited use in analyzing the challenged pay disparity.

The defendant also argues that the pay disparity is attributable to the plaintiff's performance, which the evidence reflects was weak, relative to that of her comparators, which effectively limited her salary growth. (Pl. Depo. at Ex. 13; Tucker Depo. at Ex. 5; Heath Depo. at Ex. 5).[22] As just stated, the evidence also reflects that merit increases were taken from a limited fund, so the plaintiff was competing with her comparators for scare increase amounts. (Heath Depo. at 65). It thus appears that the disparity between the plaintiff's pay and that of her comparators is based on factors other than sex.

The plaintiff argues that the defendant's asserted reasons for the pay differential—length of service and job performance—are pretexts for illegal discrimination in violation of the EPA. She asserts that the length of service is not really a factor in the pay disparity because her salary was less than that of the only comparator hired after she was hired. (Doc. 22 at 54). She also argues that, in 1998 and afterwards, several comparators who started at essentially the same salary as she did were paid significantly more than she was paid. (Doc. 22 at 54). In view of the evidence that the plaintiff's performance was weak relative to that of her comparators and that she had to compete among these comparators for scarce salary-increase funds, it is hardly surprising that comparators hired after she was hired or who started at the same salary

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[22] The defendant states that the amount and frequency of its merit increases in salary are based upon such factors as (1) job performance, (2) where the employee stands within the salary range for the position, (3) the amount and timing of the employee's last merit or promotional increase and (4) the amount of available merit increase funds. (Tucker Depo., Ex. 1 at 13).

should end up with a higher salary than hers. Regardless, as is stated above, the court is not convinced that the length-of-service arguments are useful in this analysis.

The plaintiff next challenges the defendant's ranking system, arguing that it "indicates nothing about the plaintiff's job performance." (Doc. 22 at 55). In support of this argument, she again raises the "Top Performance Award" she received in December, 1995. As noted above, however, the plaintiff's supervisor testified that this award was given to the plaintiff not because of her performance, but to boost her salary into the appropriate range for her position. The plaintiff argues that Tucker admitted that he told her she had received a top performance award based upon her job performance and she points out that he indicated in his deposition that she improved the entire time he supervised her (until August 1996). (*Id.* at 57). The court notes, however, that Tucker admitted that he misrepresented to the plaintiff the reason for her top performance award, which admission is supported by the plaintiff's low performance ranking for that year. Tucker's statement about the plaintiff improving during his supervision of her is too vague to be of value in resolving the issues before the court.

The plaintiff next challenges her low rankings for the year 1995, saying that it had nothing to do with her performance—that she was at the bottom of the list because she was not up for a raise and therefore not ranked. (Doc. 22 at 56). The evidence is, however, that the plaintiff was evaluated and ranked for 1995, and that she was the second lowest performer in her group. (Tucker Depo. at 177; Heath Depo. at Ex. 5).[23]

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[23] It does appear, however, that the plaintiff was not evaluated in 1996 because of her impending lay-off, and that the appearance of her name near the bottom of her peer group list that year was attributable to that fact. (Jones Depo. at 188–91, 198, 218, Ex. 5).

The plaintiff next argues that the rankings were arbitrary, pointing to the 1996 ranking in which Area Managers Kell, Welch, Gunter and Hicks, who did not receive raises were ranked above other Area Managers who did receive raises. (Doc. 22 at 56, citing Doc. 21 at Ex. 18). The defendant answers that the Area Managers who did not receive raises were ineligible for a raise at the time of the ranking because they had recently received raises, but that they were ranked anyway, in keeping with the defendant's practices. (Doc 26 at 12). The ranking does reflect that these employees had recently received raises. (Doc. 21 at Ex. 18). The court is not convinced that the rankings were arbitrary on the basis asserted by the plaintiff.

The plaintiff argues that some male Area Managers received similar written comments on their 1997 evaluations to those that she received on hers, but received higher scores. (Doc. 22 at 57–58). She therefore argues that the scoring system used in the evaluations is a pretext for illegal discrimination. The court is disinclined to assign great significance to what appears to be isolated instances of similar review comments combined with differing scores.

The plaintiff next argues that, in February of 1998, her new supervisor, Kelly Owen, evaluated her unfairly. First, she argues that Owen erroneously noted that she did not attend weekly safety meetings in the Business Center. There is no evidence that Owen's purported error was deliberate, that he did not make similar errors with respect to the evaluations of male employees or that the error had a significant impact on the plaintiff's ranking or salary.

Second, she argues that Owen did not have enough time to evaluate her and simply relied on some notes left by her previous supervisor, Jerry Jones, which notes she argues Jones made in retaliation against her for complaining of illegal discrimination. This allegation is addressed and

factually refuted in section f.2 below.[24] On the basis of that analysis, the court rejects this argument.

The plaintiff further argues that her performance reviews were based primarily upon the ratings Maudsley gave her in his role as Production Auditor. (*See* Tucker Depo. at 122–23). These ratings, she argues, are suspect because, in the early 1980's, Maudsely offered to arrange for her to receive a perfect evaluation in return for meeting him at a hotel and because, in the 1990's, he again made some sexual comments to her. (Pl. Depo. at 316–19). She also states that "on occasions, [she] caught Maudsley issuing low safety scores to [her] for her employees not wearing safety equipment, despite the fact that those employees were wearing all the required safety equipment." (Doc. 22 at 58). She argues that Maudsley's bias "effectively poisons legitimacy of the defendant's entire system of rating and ranking the plaintiff." (*Id.* at 58–59, citing *Gulatte v. Westpoint Stevens, Inc.*, 100 F. Supp. 2d 1315 (M.D. Ala. 2000); *Nida v. Echols*, 31 F. Supp. 2d 1358 (N.D. Ga. 1998)). Although she cites a few individual instances where Maudsley recorded erroneous information about her performance, the plaintiff does not offer evidence that Maudsley tampered with her ratings in such a way as to have a significant impact on her pay relative to males. It is not apparent that Maudsely's errors or omissions caused the pay discrepancy of which the plaintiff complains.

The plaintiff's EPA claim with respect to the Area Manager position thus fails. The defendant's motion for summary judgment as to that claim is therefore due to be granted.

2. EPA Claims as to the Technology Engineer Position

The defendant argues that it is due summary judgment on the plaintiff's EPA claim with respect to her work as a

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[24] *See* page 35 herein.

Technology Engineer because, although the plaintiff was paid less than male Technology Engineers, her salary was based on factors other than sex. The plaintiff answers that "when [she] transferred to Technical Engineer, her salary remained lower than her co-workers in the same position. Her low salary in that position carries over from her low salary as an Area Manager. If the plaintiff had been paid equally as an Area Manager, when she transferred to Technical Engineer her pay would have been equal to the male Technical Engineers." (Doc. 22 at 59). The plaintiff's argument thus depends on her assumption that her pay as Area Manager was inconsistent with the EPA. As the court has set forth above, however, the defendant is due summary judgment on the plaintiff's EPA claims relating to her pay as an Area Manager, so this claim must fail as well. The defendant is due summary judgment as to this claim.

g. Retaliation

In addition to prohibiting employers from discriminating on the basis of race, Title VII makes it unlawful:

> for an employer to discriminate against any of his employees or applicants for employment, ... because he has opposed any practice made an unlawful employment practice by this subchapter [of Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter [of Title VII].

42 U.S.C. § 2000e-3(a).

The plaintiff's retaliation claims must be evaluated under the *McDonnell Douglas* framework.[25] The plaintiff has the initial "burden of establishing a prima facie case." *McDonnell*

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[25] "Retaliation claims do involve burden-shifting as in *McDonnell Douglas-Burdine*" *Johnson v. Booker T. Washington Broadcasting Service, Inc.*, 234 F.3d 501 (citing *E.E.O.C. v. Total System Services, Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000)).

Douglas, 411 U.S. at 802, 93 S. Ct. at 1824. "If a plaintiff establishes a prima facie case of [retaliation], the defendant employer must articulate a legitimate, nondiscriminatory reason for the challenged employment action." *Chambers v. Walt Disney World, Co.*, 132 F. Supp. 2d 1356 (M.D. Fla. 2001) quoting *Chapman v. AI Transport*, 229 F.3d 1012, 1024 (11th Cir. 2000) (en banc). Once the defendant has articulated its legitimate, nondiscriminatory reasons for the adverse employment action, the court "must, in view of all the evidence, determine whether the plaintiff has cast sufficient doubt on the defendant's proffered nondiscriminatory reasons to permit a reasonable fact finder to conclude that the employer's proffered 'legitimate reasons were not what actually motivated its conduct.'" *Combs*, 106 F.3d at 1538 (citing *Cooper-Houston*, 37 F.3d at 605).

In order to establish a prima facie case of retaliation, the plaintiff must show: (1) she engaged in protected activity; (2) she suffered an adverse employment action; and (3) there was a causal link between her protected activity and the adverse employment action. *Bass v. Board of County Commissioners*, 256 F.3d 1095, at 1117 (11th Cir. 2001); *see also Gupta*, 212 F.3d at 587; *Farley v. Nationwide Mut. Ins.*, 197 F.3d 1322, 1336 (11th Cir. 1999); *Little v. United Technologies*, 103 F.3d 956, 959 (11th Cir. 1997).

The plaintiff claims that the defendant retaliated against her in violation of Title VII when it (1) transferred her to the position of Technical Engineer; (2) evaluated her performance and (3) failed to rehire her. The defendant argues that the plaintiff cannot prove a prima facie case of retaliation with respect to any of these claims, and that the court should therefore grant summary judgment as to each of them.

1. Transfer to Technology Engineer

Jerry Jones wrote a memo to his Area Managers dated July 2, 1997, addressing them as "boys." (Jones Depo. at 211). After the plaintiff complained, Jones addressed his next memo, dated July 13, 1997, to "boys and lady." (*Id.* at 211).

Jones then wrote a memo dated July 21, 1997, outlining a discussion he had with the plaintiff in which he criticized the plaintiff's job performance and she had responded that she thought he was singling her out because she was a woman.[26] (*Id.* at 127, 164–65, 202–03, Ex. 1 at D00917). Afterward, Jones strongly recommended to the plaintiff that she interview for the position of Technology Engineer. (Pl. Depo. at 105). The plaintiff applied for the position and was transferred to it as of January 5, 1998. (Pl. Depo. at 105–08; Complaint at ¶ 19). The plaintiff complains that this was an involuntary transfer in retaliation for her complaints of discrimination.

The defendant argues that the plaintiff's transfer to the position of Technology Engineer was voluntary—the result of her voluntary application for the position. Thus, it argues, there is no adverse employment action so as to allow the plaintiff to satisfy the prima facie case. The plaintiff asserts, however, that Jones told her that applying for the job would be in her best interest and essentially arranged for her to get it. Thus, she argues, there was, in essence, an adverse employment action against her.

The court doubts that what Jones did would amount to adverse employment action so as to permit the plaintiff to establish a prima facie case. Even assuming that it did amount to an adverse employment action, this claim would still fail because the defendant offers a legitimate, non-discriminatory reason for Jones's recommendation that the plaintiff apply for the Technology Engineer position. It argues that the plaintiff, who had previously been slated for lay-off in her Area

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[26] The evidence indicates that, months before he criticized the plaintiff's performance, Jones was instructed by the defendant's Human Resources staff to lay off the plaintiff and one other employee (Jones Depo. at 62–64). The decision to slate the plaintiff for layoff, which plays a part in the legitimate, non-discriminatory reason discussed below, was therefore not Jones's decision.

Manager position, told Jones that it was important to her that she continue working up until age 62, so he suggested that she apply for the Technology Engineer position in order to avoid losing employment with the defendant. (*See* Pl. Depo. at 105–09). Nothing offered by the plaintiff casts "sufficient doubt on the defendant's proffered nondiscriminatory reasons to permit a reasonable fact finder to conclude that the employer's proffered 'legitimate reasons were not what actually motivated its conduct.'" *Combs*, 106 F.3d at 1538 (11th Cir.).

2. 1997 Evaluation

The plaintiff claims that Jones's allegedly retaliatory memorandum dated July 21, 1997, was the sole basis for the 1998 evaluation she received by Jones's successor, Kelly Owen. The defendant argues that the plaintiff first raised this retaliation claim in her brief and that the court should dismiss it as a claim not properly plead.

The court agrees with the defendant that the plaintiff did not properly plead this retaliation claim. The complaint pointedly lists the other two retaliation claims herein addressed, but makes no mention of Owen's alleged use of Jones's memorandum. (Complaint at ¶¶ 35–39). Even assuming that it had been properly pled, however, the claim still fails. First, the claim is factually erroneous. A cursory comparison of Jones's July 21, 1997 memorandum (Jones Depo., Ex. 1 at D00917) and Owen's notes of his evaluation with the plaintiff (Doc. 16 at Tab 8) reveals that Owen's notes include many comments and observations not included in Jones's memorandum. Also, as the plaintiff acknowledges, Owen had a full month to evaluate her job performance. (Ledbetter Aff. at ¶ 18).[27] Thus, it is apparent that the Jones memorandum was by no means the sole basis of the plaintiff's .997 evaluation, although the plaintiff asserts that Owen told her otherwise. (Pl. Depo. at 191, 197). Even if

[27] The plaintiff's affidavit is located in the record at Doc. 21, Tab 39.

Owen did make such a statement to the plaintiff, the evidence reveals that he relied upon data other than the allegedly retaliatory memorandum. There is not a sufficient causal connection between the Jones memorandum and the 1997 evaluation to allow the plaintiff to establish a prima facie case. The defendant is therefore due summary judgment as to this claim.

3. Failure to Rehire Plaintiff

The plaintiff complains that she has applied to be rehired as a Technical Engineer with no success, while her male co-workers who have not complained of discrimination have been rehired into positions for which the plaintiff is qualified. The plaintiff cannot establish a prima facie case with respect to this claim because she does not show that "there was a causal link between [the] protected activity and the adverse employment action." *Bass*, 256 F.3d at 1117. The defendant has a policy of not rehiring former employees who have retired, although it sometimes retains them as contract employees where there has been a special request by a business center manager. (Breon Depo. at 18; Gardner Depo. at 25, 29–30; Heath Depo. at 36–38). The plaintiff has not shown that any business center manager who made contract employment requests for which she was qualified during the relevant period were aw are of her protected activity. The defendant's motion for summary judgment is due to be granted with respect to this claim.

IV. CONCLUSION

For the reasons set forth above, the undersigned recommends that the defendant's Motion for Summary Judgment (doc. 15) be granted in part and denied in part.

DONE this 3rd day of April, 2002.

/s/ John E. Ott

JOHN E. OTT

United States Magistrate Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-15264-GG

LILLY M. LEDBETTER,
Plaintiff-Appellee,

versus

GOODYEAR TIRE AND RUBBER COMPANY, INC.,
Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(October 26, 2005)

Before: TJOFLAT, DUBINA and PRYOR, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-42
(2/05)

Supreme Court, U.S.
FILED
MAY 26 2006
OFFICE OF THE CLERK

No. 05-1074

IN THE

Supreme Court of the United States

LILLY M. LEDBETTER,

Petitioner,

v.

THE GOODYEAR TIRE & RUBBER COMPANY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a plaintiff asserting a disparate pay claim under Title VII against an employer that periodically reviewed and re-established her pay under a facially neutral compensation system may challenge pay decisions prior to the last decision immediately preceding the start of the statutory limitations period.

CORPORATE DISCLOSURE STATEMENT

The Goodyear Tire & Rubber Company, Inc. does not have a parent company. No publicly held company owns 10 percent or more of its stock.

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INTRODUCTION

The only employment "practices" that can form the basis of liability under Title VII are those that "occurred" within 180 days of an employee's EEOC charge. 42 U.S.C. § 2000e-5(e)(1). Despite this limitation, the district court below permitted Petitioner to challenge discrete salary decisions made at different times by different people over her nineteen-year career at Goodyear. Pet. App. 20a. The Eleventh Circuit reversed, holding that with respect to "this specie of disparate pay claims—that is, those in which the salary or pay level being challenged was periodically reviewed and re-established by the defendant-employer"—the employee "may reach outside the limitations period created by her EEOC charge no further tha[n] the last such decision immediately preceding the start of the limitations period." *Id.* at 14a.

The Court should deny the Petition for several reasons. *First*, the Eleventh Circuit did not decide the question framed by the Petition, and there is no circuit conflict on the question framed by the court of appeals. *Second*, even as to the question framed by the Petition, there is no conflict in the circuits. *Third*, the Eleventh Circuit's decision is entirely consonant with the decisions of this Court. *Fourth*, the Court need not reach the limitations question because Petitioner's claim fails on the merits. Thus, even if the Eleventh Circuit had decided the question framed by the Petition, and even if there were a circuit split on that question, this case would not be an appropriate vehicle for deciding it.

STATEMENT OF THE CASE

1. Petitioner worked at Goodyear's Gadsden, Alabama, tire plant for nineteen years as a Supervisor and later as an Area Manager. Pet. App. 5a. She was hired on February 5, 1979 (*id.*), and was initially paid the same salary as a similarly situated male employee. *Id.* at 12a. In 1980 and 1981, Petitioner received the same pay increase as all other Area Managers at the plant. Tr. 125–28. Beginning in 1982, Goodyear determined the salaries of its managerial employees using a system of annual merit-based raises. Pet. App. 4a. Raises were based on individual performance appraisals that incorporated an employee's performance ranking, present salary, and salary range. *Id.* Petitioner and her co-workers thus had their salaries reviewed at least once annually by plant management. *Id.* at 5a.

Petitioner worked in several different departments under several different supervisors before 1992. Pet. App. 5a. Earlier in her career, she was included in two general layoffs. *Id.* Her longest layoff started in 1986 and lasted into 1987. Tr. 128–30. She did not receive salary increases in 1986 or 1987 because of that layoff. *Id.* at 129–31. She was also included in another general layoff in 1989. *Id.* at 131–32.

At trial, Petitioner conceded that the manager who established her raises in 1990, 1991, and 1992 did not discriminate against her because of her sex. Tr. 132–33. She also offered no evidence of "who, prior to 1992, the other Area Managers in [her] immediate areas of the plant were, how [she] fared against them in end-of-year performance rankings, or how her salary or the merit-based raises she received compared to theirs." Pet. App. 5a.

From mid-1992 until 1996, Petitioner was supervised by Mike Tucker, who also supervised three male Area Managers. Pet. App. 5a. Based upon Tucker's recommendations, Petitioner received a 5.28 percent salary increase in 1993, a 5 percent increase in 1994, and a 7.85 percent increase in 1995. *Id.* at 6a. Petitioner's cumulative salary increase for this period was higher than the increases for all three of the male Area Managers working under Tucker's supervision. *Id.*; Tr. 134–36; DX 57.

Petitioner was ineligible for a salary increase in 1996 because her 1995 raise had not yet been in effect for the minimum time interval required between raises at that time. Pet. App. 7a. She was also ineligible for a raise in 1997 because she was slated to be included in an upcoming general layoff. *Id.* at 7a–8a. She did not receive a salary increase in 1998 because her manager at the time concluded that her performance did not warrant an increase. *Id.* at 9a.

In August 1998, Goodyear announced that it planned to downsize the Gadsden plant and offered an early retirement option. Pet. App. 9a. Petitioner applied and was accepted for early retirement, and she retired effective November 1, 1998. *Id.* Goodyear announced in February 1999 that the Gadsden plant was to close. *Id.* The plant never completely shut down, but large-scale layoffs and transfers occurred, reducing the number of Area Managers from sixteen to four. *Id.* at 9a–10a.

2. Petitioner filed suit on November 24, 1999, asserting various claims of employment discrimination. Pet. App. 10a & n.7. The district court submitted four claims to the jury, including Petitioner's disparate pay claim under Title VII.[1] The jury

1. Although the Petition states that Petitioner "sought backpay for the period beginning 180 days before she filed her EEOC charge" (Pet. 3), in fact she sought, and the district court awarded, backpay for a period beginning two years prior to her first EEOC filing. Pet. App. 41a; Doc. 76; Tr. 236; PX 207; PX 210; PX 211.

returned a verdict in Petitioner's favor only on the pay claim, ruling in Goodyear's favor on the remaining claims. After the district court denied Goodyear's renewed motion for judgment as a matter of law on the pay claim, Goodyear filed a timely appeal. *Id.* at 11a–12a.

3. The Eleventh Circuit reversed. The court expressly limited its decision to "this specie of disparate pay claims—that is, those in which the salary or pay level being challenged was periodically reviewed and re-established by the defendant-employer." Pet. App. 14a; *see also id.* at 23a–24a, 26a, 37a. In such a case, the court held that "an employee seeking to establish that his or her pay level was unlawfully depressed may look no further into the past than the last affirmative decision directly affecting the employee's pay immediately preceding the start of the limitations period." *Id.* at 24a. The court distinguished this case, where Petitioner's pay "had been reviewed and re-established over a dozen times," from cases in which employees do not have such "regular opportunities to complain of improperly deflated pay and to seek a raise." *Id.* at 26a. The court expressly declined to decide whether other courts faced with Title VII pay cases have read *Bazemore v. Friday*, 478 U.S. 385 (1986), too broadly. Pet. App. 27a. The court noted that it "remains an open question whether a disparate-pay plaintiff, in contrast to a pattern-and-practice pay plaintiff, should be able to challenge any decision made outside the limitations period." *Id.* The court of appeals stated: "We need not address that question today, however." *Id.*

The Eleventh Circuit then reviewed the sufficiency of the evidence supporting Petitioner's claim that she was denied pay increases in 1997 and 1998 because of her sex.

Pet. App. 27a–37a.[2] Petitioner's EEOC questionnaire and charge were both filed within 180 days of the 1998 decision, so there was no issue regarding the timeliness of that claim. On the merits, the court held that Petitioner "failed to produce a scintilla of evidence from which a reasonable jury could have found" that the 1998 decision was affected by her sex. *Id.* at 31a.

The Eleventh Circuit also examined the merits of Petitioner's claim concerning the decision not to give her a raise in 1997. The court did so even though the 1997 decision was made more than 180 days prior to Petitioner's first filing with the EEOC. Pet. App. 32a–37a. Again, the court of appeals held that "no reasonable factfinder could find the decision was motivated by [Petitioner's] sex." *Id.* at 36a–37a.

REASONS FOR DENYING THE PETITION

I. The Court Of Appeals Did Not Decide The Question Framed By The Petition.

The Petition asks this Court to decide "[w]hether and under what circumstances a plaintiff may bring an action under Title VII . . . alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay

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2. Petitioner incorrectly claims the Eleventh Circuit refused to consider evidence falling outside the limitations period as background evidence in support of a timely claim. Pet. 25. The court explicitly recognized the relevance of such evidence (Pet. App. 24a) but held, even considering this evidence, no reasonable jury could find that either the 1997 or 1998 pay decision was discriminatory. *Id.* at 31a & n.21, 34a & n.25, 35a & nn.26–27, 36a–37a.

decisions that occurred outside the limitations period." Pet. i. The Eleventh Circuit did not decide that question, however. Instead, it decided a different and much narrower question. As the Eleventh Circuit framed it, the issue was "how Title VII's timely-filing requirement applies to this specie of disparate pay claims—that is, those in which the salary or pay level being challenged was periodically reviewed and re-established by the defendant-employer." Pet. App. 14a. The court of appeals described the issue in those terms not once, as Petitioner asserts (Pet. 4 n.5), but at least four times. Pet. App. 2a ("The question we must decide . . . is how Title VII's timely-filing requirement applies in this specie of disparate pay cases—that is, cases involving an employer that annually reviews and re-establishes employee salary levels"); *id.* at 14a; *id.* at 23a–24a ("Limits on how far into the past the plaintiff can look for an intentionally discriminatory decision are most obviously warranted where, as here, the employee's pay level was subjected to periodic re-assessment through regularly-scheduled raise decisions."); *id.* at 26a (prior Eleventh Circuit decision "did not involve, as this case does, an employee whose pay had been reviewed and re-established over a dozen times."). There is no circuit split on the narrow question decided by the Eleventh Circuit, nor does Petitioner even suggest there is.

Petitioner in a footnote now quibbles with the Eleventh Circuit's framing of the question, claiming that her pay was not in fact "periodically reviewed and re-established" by Goodyear. Pet. 4 n.5. This is a factual argument that Petitioner did not raise in her rehearing petition below. Accordingly, neither the panel nor the full Eleventh Circuit had an opportunity to consider the argument she raises now for the

first time.[3] There can be no question that the precedential effect of the Eleventh Circuit's decision is limited to the issue framed and decided by the court. More important, the nature of Goodyear's annual pay raise system is a fact-bound issue that does not merit review by this Court.

Even as to the narrow question framed by the Eleventh Circuit, the court's holding was limited and qualified. The court held only "that in the search for an improperly motivated, affirmative decision directly affecting the employee's pay, the employee may reach outside the limitations period created by her EEOC charge no further tha[n] the last such decision immediately preceding the start of the limitations period." Pet. App. 14a. The court qualified its holding, stating, "We do not hold that an employee may reach back even that far; what we hold is that she may reach no further." *Id.*

In sum, the question framed by the Eleventh Circuit's opinion is different from and much narrower than the question framed by the Petition. The court's tentative and limited answer to the narrow question it framed does not

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3. Petitioner does not dispute that her pay was re-evaluated periodically, but apparently contends that the periodic reviews did not "re-establish" her pay because employees' salary rates carried over from the prior year and annual increases were subject to certain caps. Pet. 4 n.5. Yet as Petitioner herself acknowledges, the annual pay evaluations also included consideration of the employee's present salary and salary range. *Id. See also* Pet. App. 6a & n.3 (noting there was evidence at trial that Ledbetter received a substantial increase of 7.85 percent in 1995 because her supervisor "wanted to raise her salary and thought he could only do so significantly by giving her a 'top performance award'"). Moreover, pay increases could exceed annual caps. In fact, Petitioner's substantial increase in 1995 was well in excess of the annual "cap." *Id.* at 6a.

conflict with any decision of this Court or any other court of appeals. Petitioner does not even suggest the existence of a conflict on the question decided by the Eleventh Circuit that would warrant further review.

II. The Courts Of Appeals Are Not In Conflict Over The Question Presented.

Even if the Eleventh Circuit had actually decided the broad question framed by the Petition, its decision would not conflict with any decision of another court of appeals. This Court's recent decision in *National Railroad Passenger Corp. v. Morgan* resolved how to determine the timeliness of discrete discrimination claims as well as hostile environment claims under Title VII. 536 U.S. 101, 110–22 (2002). The Court decided *Morgan* just four Terms ago. Since then, less than half the circuits have issued published opinions applying *Morgan* to disparate pay claims. *See Forsyth v. Federation Employment & Guidance Serv.*, 409 F.3d 565, 572–74 (2nd Cir. 2005) (concluding that district court erred in finding *pro se* plaintiff's disparate pay claims untimely but affirming summary judgment for employer on the merits); *Shea v. Rice*, 409 F.3d 448, 451–56 (D.C. Cir. 2005) (reversing Rule 12(b)(6) dismissal of *pro se* plaintiff's Title VII pay claims as untimely); *Law v. Continental Airlines Corp.*, 399 F.3d 330, 332–34 (D.C. Cir. 2005) (affirming summary judgment holding ADEA pay claims were time-barred); *Reese v. Ice Cream Specialties*, 347 F.3d 1007, 1009–14 (7th Cir. 2003) (reversing summary judgment finding disparate pay claims untimely); *Hildebrandt v. Illinois Dept. of Natural Res.*, 347 F.3d 1014, 1025–29 (7th Cir. 2003) (remanding disparate pay claims under Title VII for further proceedings following trial of claims under Equal Pay Act);

Tademe v. St. Cloud State Univ., 328 F.3d 982, 989–90 (8th Cir. 2003) (assuming pay claims were timely but affirming summary judgment for employer on the merits). The decision below was the Eleventh Circuit's first published opinion applying *Morgan* outside the context of hostile environment claims. *See* Pet. App. 16a–19a.

Petitioner asserts that the Eleventh Circuit "acknowledged that its decision was in conflict with the post-*Morgan* decisions of other courts of appeals, including the Second and D.C. Circuits." Pet. 7 (citing Pet. App. 27a & n.19). Petitioner is incorrect. After discussing *Morgan* in the context of discrete pay discrimination claims, the Eleventh Circuit stated that *Morgan* "*may indicate*" that some courts have "read *Bazemore* too broadly." Pet. App. 27a (emphasis added). The court stated that "it therefore remains an open question whether a disparate-pay plaintiff . . . should be able to challenge any decision made outside the limitations period." *Id.* The court dropped a footnote with citations to other circuit cases—including the Second Circuit and D.C. Circuit decisions discussed in the Petition—that had reached this question. *Id.* at n.19. This explains why the footnote begins with the words "But see. . . ." *Id.* The Eleventh Circuit then stated, "*We need not address that question today, however.*" *Id.* at 27a (emphasis added). Thus, the Eleventh Circuit did not acknowledge a split with the Second and D.C. Circuits. It simply noted that other circuits had decided a limitations question that it chose to leave unresolved; the court opted instead to decide the case on the merits.

Moreover, the Second Circuit's decision in *Forsyth* and the D.C. Circuit's decision in *Shea* do not conflict with the decision below because the plaintiffs in both *Forsyth* and *Shea* challenged a facially discriminatory pay structure. The plaintiff in *Forsyth* alleged a discriminatory "salary structure" or "pay scale"

imposed when the defendant hired him as its first black employee in 1989. 409 F.3d at 567–68, 573. The record showed that the plaintiff's unequal pay was attributable to differences between him and other employees in their starting wage. *Id.* at 568. The district court granted summary judgment to the employer, finding the plaintiff's claims were untimely and that he had failed to establish a genuine issue of discrimination. *Id.* at 566–67. Petitioner incorrectly asserts that the Second Circuit reversed the judgment of the district court. Pet. 10 ("On appeal, the Second Circuit reversed."). In fact, the court affirmed. 409 F.3d at 573–74. *See id.* at 567 ("Although we affirm that judgment, we write to explain that plaintiff's claim for relief alleging salary discrimination was properly dismissed because Forsyth failed to establish genuine issues of triable fact with respect to it, and not because plaintiff's claim was time-barred as the district court believed."). The Second Circuit's discussion of the limitations question was thus unnecessary to its ultimate disposition of the case. Furthermore, *Forsyth*'s limitations discussion does not apply here because the plaintiff there, unlike Petitioner, was challenging "a discriminatory pay scale set up outside of the statutory period." *Id.* at 573.

Similarly, the plaintiff in *Shea* challenged a State Department diversity program that set his initial pay grade too low on account of his race and ethnicity. 409 F.3d at 449–50. In other words, he alleged that the State Department had adopted a two-tier wage structure that discriminated against white employees of Irish descent. *Id.* Moreover, the D.C. Circuit decided *Shea* on appeal from a dismissal under Federal Rule of Civil Procedure 12(b)(6). *Id.* The court emphasized that at that early stage of the litigation, dismissal was appropriate only if it appeared "beyond doubt" that the plaintiff could not prove a set of facts in support of his claim

which would entitle him to relief. *Id.* at 451. Even in the context of a motion to dismiss, the D.C. Circuit stated that discrete pay claims such as Petitioner's would be untimely:

> If Shea were complaining of the assignment of a discriminatorily low pay grade only, we would agree [his claim would be untimely] under a clear line of Supreme Court cases—*United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977), *Delaware State College v. Ricks*, 449 U.S. 250 (1980) and *Lorance v. AT&T Techs, Inc.*, 490 U.S. 900 (1989)—that bars claims where the relevant aspect of the employment system (such as a promotion, seniority, or termination) is facially neutral, and any discrete discriminatory conduct took place and ceased outside the period of limitations.

Id. (parallel citations, internal quotation, and citation omitted). It was only because the plaintiff's allegations went further to challenge "a persistent discriminatory salary structure" (*id.* at 453), as opposed to isolated decisions under a neutral salary system, that the court held he had pleaded an actionable claim:

> Shea's claim is *explicitly* premised on the existence of such a "discriminatory system." He alleged that he was hired at a lower pay grade and continues to receive discriminatory pay pursuant to the State Department's discriminatory diversity program.

Id. at 455.

Judge Williams concurred separately in *Shea* "to underscore the precise distinction that we draw . . . between cases where a plaintiff can recover for the current consequences of a discrete discriminatory act in a time-barred period and cases where he or she may not." *Id.* at 456 (Williams, J., concurring). In his opinion, "[t]he distinction turns . . . on whether one may reasonably characterize the defendant employer as applying a discriminatory *salary structure* in the unbarred period." *Id.* at 456 (emphasis added). Because the plaintiff had alleged a "two-class pay structure" rather than an "isolated act" arising in the time-barred period, Judge Williams agreed that the complaint could proceed. *Id.* at 458.

Forsyth and *Shea* are readily distinguishable from the Eleventh Circuit's decision. This case does not involve a facially discriminatory pay scale or salary structure, such as those challenged in *Forsyth* and *Shea*. Rather, Petitioner was hired at the same pay rate as a male comparator. Pet. App. 12a. Her claim is based upon isolated pay decisions made at different times by different decisionmakers under a facially neutral compensation program. *See* Pet. 4; Pet. App. 20a. Contrary to Petitioner's argument (Pet. 11–12), such claims would be untimely even under *Shea*. *See* 409 F.3d at 451. Similarly, the *Shea* plaintiff's claims would be timely under the Eleventh Circuit's opinion because he challenged only his initial wage assignment, not any intervening decision. *See* Pet. App. 25a–27a (explaining that, like *Shea*, the Eleventh Circuit's prior decision in *Calloway v. Partners National Health Plans*, 986 F.2d 446 (11th Cir. 1993), "belongs in a different category of pay-related cases and is fully consistent with the rule we announce today"). There is thus no circuit conflict even on the question framed by the Petition. To the extent there is any doctrinal disagreement

among the circuits over how *Morgan* applies to pay claims, that disagreement is narrow and immature and thus does not warrant review by this Court.

Furthermore, no other court of appeals has considered the Eleventh Circuit's suggestion "that in the search for an improperly motivated, affirmative decision directly affecting the employee's pay, the employee may reach outside the limitations period created by her EEOC charge no further tha[n] the last such decision immediately preceding the start of the limitations period." Pet. App. 14a. Indeed, the Eleventh Circuit itself did not definitively decide the question here, leaving that for another day. *Id.* ("We do not hold that an employee may reach back even that far; what we hold is that she may reach no further."). This Court should not grant certiorari to resolve that issue before it has been definitively decided by the Eleventh Circuit and considered by any other court of appeals.

III. The Eleventh Circuit's Decision Is Consistent With This Court's Precedent.

The Eleventh Circuit's decision is correct and supported by this Court's precedent. In applying Title VII's time limitations, this Court has consistently held that discrete acts of discrimination are actionable only if they are challenged in a timely EEOC charge. Absent such a charge, the Court has refused to allow the present effects of past actions to save an untimely claim. Petitioner's attempt to challenge every allegedly discriminatory decision made since 1979, when she was hired, based on the effects those decisions had on paychecks received within 180 days of March 25, 1998, when she filed her EEOC questionnaire, finds no support in this Court's Title VII jurisprudence.

In *Morgan*, the Court rejected the various "continuing violation" concepts the circuits had adopted to extend Title VII's time limitations. 536 U.S. at 107–08. It recognized that "[b]y choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination." *Id.* at 109 (internal quotation omitted). The Court therefore looked to Title VII's "statutory text," which provides that "[a] charge under this section *shall be filed* within one hundred and eighty days *after the alleged unlawful employment practice occurred*." *Id.* (quoting 42 U.S.C. § 2000e-5(e)(1)) (emphasis added by the Court). The critical questions, the Court observed, are: "What constitutes an 'unlawful employment practice' and when has that practice 'occurred.'" *Id.* at 110. The Court held that "[a] discrete retaliatory or discriminatory act 'occurred' on the day that it 'happened.'" *Id.* Because the employee sought to challenge discrete acts that occurred outside the charge filing period, the Court concluded his Title VII claims concerning those acts were "untimely filed and no longer actionable." *Id.* at 114–15. "While Morgan alleged that he suffered from numerous discriminatory and retaliatory acts from the date that he was hired through . . . the date that he was fired," the Court said "only incidents that took place within the timely filing period are actionable." *Id.* at 114.

Petitioner's theory that she should be able to challenge pay decisions made "at any point in the past" based solely on "paychecks received during the limitations period" (Pet. 9) is untenable after *Morgan*. The plaintiff in *Morgan* similarly argued that his employer's past acts constituted an "ongoing violation that can endure or recur over a period of time." 536 U.S. at 110. The Court rejected that argument. It looked instead to Title VII's definition of "unlawful

employment practices," which lists "numerous discrete acts" such as "to fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual with respect to his *compensation*, terms, conditions, or privileges of employment." *Id.* at 111 (quoting 42 U.S.C. § 2000e-2(a)) (emphasis added). Discrete acts such as these "are easy to identify" and must be made the subject of a timely charge to be actionable, the Court held. *Id.* at 114. In so holding, the Court explicitly rejected Petitioner's theory "that so long as one act falls within the charge filing period, discriminatory and retaliatory acts that are plausibly or sufficiently related to that act may also be considered for the purposes of liability." *Id.*

Morgan is only the most recent of this Court's decisions on point. In *United Air Lines, Inc. v. Evans*, the Court also held that the present effects of past acts of discrimination are not actionable without a timely charge. 431 U.S. 553, 558 (1977). Evans had been forced to resign because of United's policy against married female flight attendants. *Id.* at 554. Years later, after abandoning the policy, United rehired Evans but did not give her credit for her prior service. *Id.* at 555. This directly affected her rate of pay. *Id.* at 555 & n.5. Like Petitioner, Evans argued that because her pay was lower than it would have been but for the discriminatory acts years earlier, the seniority system gave "present effect to the past illegal act and therefore perpetuate[d] the consequences of forbidden discrimination." *Compare id.* at 557 *with* Pet. 4. Although the Court agreed that "United's seniority system does indeed have a continuing impact on her pay and fringe benefits," the Court held that Evans had failed to assert a timely claim. 431 U.S. at 558. As in *Morgan*, the Court observed that "the emphasis should not be placed on mere continuity; the critical question is whether any present

violation exists." *Id.* Because there was no present violation, the Court concluded "United was entitled to treat [the] past act as lawful after [she] failed to file a charge of discrimination" within the charge filing period. *Id.*

Similarly, in *Delaware State College v. Ricks*, the Court refused to apply a "continuing violation" theory to save a discrete employment decision from the limitations bar. 449 U.S. 250, 257 (1980). The Court observed that "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." *Id.* Ricks was a college professor who was denied tenure. *Id.* at 252. Rather than challenge the decision when it was made, Ricks waited almost a year to file his EEOC charge, near the end of his one-year terminal contract. *Id.* at 253–54. As in *Morgan*, the Court focused on when exactly the alleged "unlawful employment practice" occurred. *Id.* at 257. Distinguishing between the act's occurrence and its lingering effects, the Court observed that "the only alleged discrimination occurred—and the filing limitations periods therefore commenced—at the time the tenure decision was made and communicated to Ricks. That is so even though one of the *effects* of the denial of tenure—the eventual loss of a teaching position—did not occur until later." *Id.* at 258. The Court rejected Ricks's argument that his termination gave "present effect to the past illegal act and therefore perpetuates the consequences of forbidden discrimination." *Id.* (internal quotation omitted). As in *Evans*, the Court stated "the proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." *Id.* (internal alterations, quotation, and citations omitted).

Petitioner tries to escape the holdings of *Morgan*, *Evans*, and *Ricks* by arguing that pay discrimination claims somehow require a different limitations analysis. Pet. 21–22 & n.15. Her support for this argument is a single sentence, taken out of context, from the Court's opinion in *Bazemore v. Friday*. Pet. 20–21. Despite Petitioner's claim that *Bazemore* "explained that the plaintiff's claim was timely" (Pet. 24), the issue presented in *Bazemore* was not a limitations question. Rather, it was whether Title VII applied to a facially discriminatory two-tier wage structure that had been in place since before Congress made Title VII applicable to public employers. 478 U.S. at 386–87, 394. Moreover, *Bazemore* did not involve past acts of discrimination that had present effects on a single employee's pay. Instead, the case was a pattern-or-practice case in which the United States alleged that Title VII required the employer to stop its admitted, ongoing practice of paying its black employees less than white employees because of their race. *Id.* at 391–95.[4] In those circumstances, the Court held,

> A *pattern or practice* that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that practice, it is liable under that statute.

Id. at 395 (emphasis added). It was in this context that the Court stated, "Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable

4. The Court in *Morgan* reserved judgment on "the timely filing question with respect to 'pattern-or-practice' claims brought by private litigants." 536 U.S. at 115 n.9.

under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." *Id.*

Petitioner's reliance on *Bazemore* is thus misplaced. In *Bazemore* itself, the Court noted that *Evans* still applies where, as here, a neutral pay system merely carries forward the effects of past acts that a single employee failed to challenge in a timely matter. 478 U.S. at 396 n.6. *See also Evans*, 431 U.S. at 558. Because this is not a pattern-or-practice case, and Petitioner did not challenge Goodyear's annual pay review system as facially discriminatory, *Bazemore* is inapposite. *See Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 906–08, 912 n.5 (1989) (observing that *Evans* and *Ricks* foreclosed plaintiffs' argument that alleged Title VII violation occurred not only when their prior seniority "was eliminated but also when each of the concrete effects of that elimination was felt" and stating that a facially neutral system that has present effects is not equivalent to a facially discriminatory system, as in *Bazemore*, that "by definition discriminates each time it is applied"), *superseded by* 42 U.S.C. § 2000e-5(e)(2) "with respect to a seniority system that has been adopted for an intentionally discriminatory purpose."

Petitioner acknowledges that she is seeking to "reclaim" her Title VII rights. Pet. 23. But Title VII rights, like most statutory rights, are subject to statutes of limitations that are designed to prevent "revival of claims that have been allowed to slumber." *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348–49 (1944). "The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Id.* at 349. As the

Court held in *Evans*, Title VII affords no rights to a plaintiff who does not file a timely charge of discrimination. 431 U.S. at 558. Petitioner refuses to accept the basic point, recognized in *Ricks*, that Title VII's "limitations periods, while guaranteeing the protection of the civil rights law, also protect employers from the burden of defending claims arising from employment decisions that are long past." *Ricks*, 449 U.S. at 256–57. Under Petitioner's theory, she should have been allowed to hold Goodyear liable for any disparity reflected in her 1998 paychecks, even if that disparity was "caused by decision[s] made years earlier." Pet. 8. Yet this would allow employees to wait as long as possible—after decisionmakers had retired or died, documents had been lost or discarded,[5] and witnesses' memories had faded—before challenging isolated decisions made over the course of their career. *Order of Railroad Telegraphers*, 321 U.S. at 348–49. As the Court observed in *Morgan*, Congress adopted "quite short deadlines" in Title VII to protect employers against such stale claims. 536 U.S. at 109 (internal quotation omitted). *See* Pet. App. 23a.

IV. This Case Does Not Provide A Good Vehicle For Deciding The Limitations Question Because Petitioner's Claim Fails On The Merits.

Even if the Eleventh Circuit had decided the statute of limitations question framed by the Petition, and even if there were a real and mature circuit conflict on that question, this case would not be a good vehicle for resolving that conflict.

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5. The applicable EEOC regulation only requires an employer to preserve "records having to do with . . . rates of pay or other terms of compensation . . . for a period of *one year* from the date of the making of the record or the personnel action involved, whichever occurs later." 29 C.F.R. § 1602.14 (emphasis added).

This is so because the court decided the core of Petitioner's case—the 1997 and 1998 pay decisions—based on the sufficiency of the evidence presented at trial. *See* Pet. App. 27a–37a. Petitioner glosses over the latter portion of the court's opinion, which applied the doctrine established in *McDonald Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), to the record evidence. *See* Pet. 7–8. The Eleventh Circuit's decision on the merits rests on the application of settled doctrine to fact-bound issues following a jury trial.

Although the Eleventh Circuit did not make a definitive holding on the merits of salary decisions made prior to 1997, it is clear from its opinion and the trial record that no reasonable jury could have found intentional sex discrimination even in those years. For example, Petitioner was not eligible for a raise in 1996 (Pet. App. 7a), so she has no claim for that year. In addition, the manager who reviewed Petitioner's pay in 1995, 1994, and 1993 recommended that she receive higher cumulative pay raises over that period than any of the male Area Managers he supervised. Pet. App. 5a–6a; DX 57.[6] And Petitioner conceded at trial that the manager who determined her raises in 1992, 1991, and 1990 had no discriminatory animus. Tr. 132–33. Petitioner thus failed to produce sufficient evidence at trial showing any discriminatory decision from 1990 through 1996.

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6. Although Defendant's Exhibit 57 shows one male employee, Dick Jones, had a higher cumulative pay raise for this period, Petitioner admitted at trial that Jones was not similarly situated to her. Tr. 134–36.

The Eleventh Circuit recognized that Petitioner also failed to produce sufficient evidence to support her claims for the period prior to 1992:

> The record does not disclose who, prior to 1992, the other Area Managers in Ledbetter's immediate areas of the plant were, how Ledbetter fared against them in end-of-year performance rankings, or how her salary or the merit-based raises she received compared to theirs.

Pet. App. 5a. Petitioner thus failed to prove even the most basic elements of a pay discrimination claim for the years prior to 1992. *Id.*

At trial, Petitioner offered only bits of anecdotal evidence, such as two isolated sexist comments by a plant manager or her testimony that a non-managerial employee admitted to her that he manipulated some of her performance data.[7] Petitioner discusses this anecdotal evidence (*see* Pet. 3–4), but she fails to acknowledge that the Eleventh Circuit found this evidence had no probative value. The court described her testimony of sexist comments supposedly made by a plant manager as "hearsay upon hearsay."[8] Pet. App. 35a & n.27. Moreover, Petitioner did not prove when these statements supposedly were made, or whether the speaker played any role in setting her salary. *Id.* at 35a–36a. For these reasons the court concluded that this testimony was not sufficient to support an inference of discrimination. *Id.* at 36a–37a. The court also found that

7. The person whom Petitioner claims made this admission could not rebut her testimony at trial because he was dead. Tr. 147.

8. Goodyear objected to this hearsay testimony, but the district court overruled the objection. Pet. App. 35a & n.27.

Petitioner's evidence concerning falsified data had no probative value because it was relevant only to the accuracy of her manager's independent performance rankings, not to his intent. The court explained, "It is not discriminatory to honestly rely on inaccurate information, and there was no evidence that [Petitioner's manager at the time] acted any way but in good faith reliance on the information he was using." *Id.* at 31a-32a & n.21 (citations omitted).

This case is thus not an appropriate vehicle for deciding the broad timeliness question framed by the Petition. It is apparent from the Eleventh Circuit's opinion and the trial record that Petitioner failed to adduce sufficient evidence to prevail on her pay discrimination claim at any time during her career. Deciding the question presented will not change the outcome of this case.

CONCLUSION

For these reasons, the Court should deny the Petition.

Respectfully submitted,

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Lilly M. Ledbetter,

Petitioner,

v.

Goodyear Tire and Rubber Company, Inc.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

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REPLY BRIEF FOR THE PETITIONERS

It is common ground among the parties and the courts of appeals that the limitations period for filing a Title VII claim begins to run anew for each discrete "unlawful employment practice." Pet. 12-13; BIO 1; *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101, 113 (2002) ("Each discrete discriminatory act starts a new clock for filing charges alleging that act."). There is substantial dispute, however, over whether in a disparate pay case the unlawful employment practice occurs at the time an employer makes a decision setting the employee's pay rate or whether it is instead the actual payment of a discriminatory wage that violates Title VII and, hence, begins the limitations period anew with each unlawful paycheck. Compare, *e.g.*, Pet. App. 23a (holding that "the operative act of discrimination will always be, not the act of issuing paychecks, but the act of making the underlying decision about what the plaintiff should be paid") with *Forsyth* v. *Federation Employment & Guidance Service*, 409 F.3d 565, 573 (CA2 2005) ("[E]very paycheck stemming from a discriminatory pay scale is an actionable discrete discriminatory act."); *Shea* v. *Rice*, 409 F.3d 448, 452 (CADC 2005) ("[An] employer commit[s] a separate unlawful employment practice each time he pa[ys] one employee less than another for a discriminatory reason."). Respondent does not contest that this question is of considerable importance to employers and employees alike, a fact confirmed by the EEOC in its brief to the Eleventh Circuit in this case. EEOC Br. 1 (noting importance of issue); see also Pet. 16-17 (EEOC receives thousands of disparate pay claims each year). Instead, respondent attempts to obscure the fundamental disagreement among the courts, proposing various distinctions among the cases that were immaterial to the courts themselves and plainly irrelevant as a matter of law.

1. Respondent does not dispute that the Eleventh Circuit held below that the relevant unlawful employment practice in

a disparate pay case is the decision setting the pay rate, rather than the issuance of the paycheck. See Pet. App. 23a. Nor does respondent contest – indeed, it insists – that if this is correct, it directly follows under *Morgan* that a plaintiff may not bring a disparate pay claim if the pay-setting decision was made outside the limitations period. See BIO 14-15. As discussed in the petition and *infra*, that conclusion is directly contrary to the decisions of several other circuits.

Respondent nonetheless argues that the decision below is not worthy of this Court's consideration because the court of appeals limited its holding to a "narrow" subset of disparate pay cases, namely cases in which the employer periodically reviews and "re-establishes" employee pay. BIO 6. This argument is entirely unconvincing. It is true that the court of appeals pointed to Goodyear's system of annual pay raise reviews as a ground for distinguishing prior circuit precedent (while also suggesting that the precedent was wrongly decided). See Pet. App. 26a-27a. But it is equally true that this purportedly "narrow" holding governs a substantial portion of disparate pay claims in the Eleventh Circuit. Importantly, the court made perfectly clear that all that is required to invoke its holding is that the employees have "regular opportunities to complain of improperly deflated pay and to seek a raise." Pet. App. 26a. Thus, although the court used the phrase "re-assessment" at times, it plainly did not mean either to restrict its holding to cases in which an employer conducts a *de novo* assessment of the worker's proper wage, or to exclude cases in which supervisors only have authority to provide a modest increase to the worker's pre-existing salary.[1] Respondent does not contest that a

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[1] It is undisputed that in this case, as in most, the employer took a worker's prior salary as a given and decided simply whether to give that worker a marginal raise. See, *e.g.*, BIO 2; Pet. 4 & n.5. It was also uncontroverted at trial that Goodyear strictly limited supervisors' authority to grant raises, establishing general caps of

substantial portion of the workforce has its pay subject to such "periodic reassessments" and therefore will be subject to the rule announced in this case.[2]

Respondent also suggests that this Court's review should be delayed because other circuits might change their view in light of the Eleventh Circuit's decision in this case. But that assertion is entirely implausible, as the existence of a system of annual pay raise reviews has no relevance under the rationales adopted by those courts, see *infra*, and has no conceivable relevance to the question under *Morgan*, namely whether tendering a discriminatory paycheck constitutes an "unlawful employment practice" under Title VII. Indeed, respondent itself never argued for such a distinction before the panel, see C.A. Br. 22-32, and makes no defense of that distinction now, see BIO 13-19. Moreover, *Bazemore* v. *Friday*, 478 U.S. 385 (1986), itself – which *Morgan* reaffirmed – involved a system of periodic review indistinguishable from Goodyear's. Pet. 23-25; EEOC Br. 10. The Eleventh Circuit's holding should not evade review simply because it is so untenable that no other court has had occasion to reject it.

2. As demonstrated in the petition (Pet. 9-15) numerous circuits hold that because the issuance of a discriminatory paycheck constitutes an "unlawful employment practice" under Title VII, each paycheck begins a new limitations period in which the employee can challenge the discrimination, even if the decision to engage in that discrimination was made outside the limitations period. See, *e.g.*, *Forsyth*, 409 F.3d at 573 (CA2); *Shea*, 409 F.3d at 452

5% with the possibility of an additional 5% "Top Performed Award." See Pl. Ex. 17 at 3, 5; contra BIO 7 n.3.

[2] The court purported to leave open whether an employee could base a claim on the most recent pay decision occurring before the commencement of the limitations period, Pet. App. 14a, but that reservation was made to preserve the court's ability to *expand* the scope of its restrictive rule, not to narrow it. Contra BIO 7.

(CADC); *Goodwin* v. *Gen. Motors Corp.*, 275 F.3d 1005, 1008-10 (CA10 2002); *Ashley* v. *Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 167-68 (CA8 1995) (en banc); *Brinkley-Obu* v. *Hughes Training, Inc.*, 36 F.3d 336, 348 (CA4 1994); *Hall* v. *Ledex, Inc.*, 669 F.2d 397, 398 (CA6 1982). Respondent's limited attempt to reconcile the decision below with the law of these circuits is entirely unsuccessful.

Second Circuit. Respondent attempts to distinguish the law of the Second Circuit by asserting that *Forsyth* involved a "facially discriminatory pay structure," BIO 9, while petitioner challenged only "isolated pay decisions" made under a "facially neutral compensation program," *id.* 12. Just why this is so, respondent fails to explain. The claims in both cases are entirely indistinguishable. In each, the employer hired workers at a starting wage, subject to periodic evaluation for possible pay raises. See 409 F.3d at 567-68. Forsyth did not claim that there was anything "facially discriminatory" about such a system. Certainly, his employer did not have a written policy calling for disparate pay based on race. Instead, Forsyth, like petitioner, alleged that his employer made a series of discriminatory pay decisions under a pay system that did not overtly discriminate. See 409 F.3d at 567 (plaintiff alleged that his "employer discriminated against him * * * when making salary increase * * * decisions" and that others "were given more frequent wage increases or higher entry salaries").

Respondent latches on to the Second Circuit's description of Forsyth's claim as challenging a "discriminatory pay scale," BIO 10, perhaps hoping to give the impression that Forsyth was challenging some aspect of the employer's broader salary practices or policies. But that the phrase simply referred to the plaintiff's particular salary level, a pay scale that was no less the result of "isolated pay decisions" than was petitioner's. See 409 F.3d at 567-68, 573.

Respondent also appears to argue that Forsyth's claims were somehow structural because, it says, his claims arose

solely from the initial setting of his wage. BIO 10. But that claim is false, inexplicable, and, in any event, manifestly irrelevant to the Second Circuit's analysis. The claim is false because Forsyth plainly alleged that the disparity arose both from the initial starting wage and subsequent raise decisions. 409 F.3d at 567.[3] The assertion is inexplicable because respondent has not even suggested why discrimination in setting an individual's starting wage would render a pay structure "facially discriminatory" while the same discrimination in denying a subsequent raise would be an "isolated pay decision[]." And the asserted distinction is plainly irrelevant to the Second Circuit's holding, which turned on the timing of the paychecks rather than the timing of the discrimination. See *id.* at 573 (plaintiffs can sue "if a paycheck resulting from such a discriminatory pay scale is delivered during the statutory period"). That is, the Second Circuit recognized that under *Morgan*, the dispositive question was "when the unlawful practice occurs," *id.* at 572, and held that the "wrong actionable under Title VII" occurs with "each week's paycheck," rather than with each decision setting a starting salary or denying a raise. *Ibid.* See also *Elmenayer* v. *ABF Freight System, Inc.*, 318 F.3d 130, 134 (CA2 2003) ("[A]n employer performs a separate employment practice each time it takes an adverse action against an employee, even if that action is simply a periodic implementation of an adverse decision previously made."). Accordingly, "*[a]ny* paycheck given within the state of limitations period therefore would be actionable." *Forsyth*, 409 F.3d at 573 (emphasis added). The Eleventh Circuit

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[3] In its discussion of the facts, the Second Circuit observed in passing that the difference between Forsyth's wage and that of two of the three proposed comparators "*appeared to be* in the starting salary" alone, *id.* at 567-68 (emphasis added), but reached no firm conclusion on the question, did not discuss the third comparator, and never mentioned the issue again.

directly rejected that conclusion in this case, creating an undeniable conflict with the Second Circuit.

D.C. Circuit. Respondent's attempted distinction of D.C. Circuit precedent relies on a similar mischaracterization of that court's holding. Contrary to respondent's assertions, the court's decision in *Shea* did not turn on the fact that the pay disparity arose because of a general policy (BIO 11) but rather on the fact that the pay decision continued to be implemented with each pay check. See, *e.g.*, 409 F.3d at 454 (Shea's claim was timely because defendant "discriminated against him within the limitations period (and thereafter) by issuing him discriminatory payroll checks"). Thus, respondent's quotation of the opinion (BIO 11) is incomplete and misleading. To be sure, the court stated that Shea's suit would be time-barred if he "were complaining of the assignment of a discriminatorily pay grade only." BIO 11 (quoting 409 F.3d at 451). But the court then went on to explain:

> Shea's complaint, however, is not simply that the State Department discriminated against him in assigning him to a lower pay grade than similarly-situated minority hires in 1992 but that, as a consequence of the "racially discriminatory" diversity program it then operated, he "*receives less pay with each paycheck than [he] would be [receiving] if [he] had not been discriminated[] against.* We believe that this allegation is properly analyzed * * * under the holding in [*Bazemore*].

409 F.3d at 452 (emphasis in original). As the court's choice of emphasis reflects, the critical point was not that Shea's pay was reduced because of a policy or "structure," but rather that the policy resulted in "a separate unlawful employment practice each time [the employer] paid one employee less than another for a discriminatory reason," *id.* at 452 (citing *Bazemore*, 478 U.S. at 396). Indeed, the court made clear that had the discriminatory policy affected only Shea's initial

salary grade assignment, but not his present pay, his claim would have been time-barred despite the fact that the assignment was the result of a "two-tier wage structure" (BIO 10) implementing a department policy. *Id.* at 451.

Even under respondent's interpretation, the rule of the Second and D.C. Circuits conflicts with the decision below, for the Eleventh Circuit makes no exception for claims based on a "facially discriminatory salary structure" (BIO 9). See Pet. App. 24a. Respondent asserts otherwise, claiming that "the *Shea* plaintiff's claims would be timely under the Eleventh Circuit's opinion because he only challenged his initial wage assignment," BIO 12, a type of claim, respondent says, that is still actionable under *Calloway* v. *Partners National Health Plans*, 986 F.2d 446 (CA11 1993). BIO 12. But the panel made clear that the suit in *Calloway* was timely not because it challenged only the initial pay grade assignment, but rather because there was "no indication * * * in *Calloway* that the employer had in place any sort of system like Goodyear's, giving the plaintiff regular opportunities to complain of improperly deflated pay and to seek a raise." Pet. App. 26a. Given that both Forsyth and Shea were subject to such reviews, their suits plainly survived only because they were brought in the Second and D.C. Circuits rather than the Eleventh.

Other Courts. Respondent does not even attempt to distinguish the conflicting authority from other circuits identified in the petition and the court of appeals' decision. See Pet. 14-15; Pet. App. 20a & n.17 (collecting cases).[4] That these cases were decided prior to *Morgan* provides no reason to believe that they are no longer binding circuit precedent on the question presented. This Court itself recognized that *Morgan* left untouched *Bazemore*'s conclusion that each discriminatory paycheck constitutes a discrete violation of

---

[4] Nor does respondent disagree that the law in the Seventh Circuit is confused and conflicting. Pet. 13-14.

Title VII. See 536 U.S. at 112. Accordingly, when presented with the argument, both the Second and the D.C. Circuits explicitly rejected the assertion that *Morgan* undermined their pre-*Morgan* precedents applying *Bazemore*. See *Forsyth*, 409 F.3d at 572-73; *Shea*, 409 F.3d at 453-54. A recent decision from the Eighth Circuit likewise reaffirmed that court's continued reliance on *Bazemore* as establishing that "each week's paycheck that delivers less on a discriminatory basis is a separate Title VII violation." *Wedow* v. *City of Kansas City*, 442 F.3d 661, 671 (2006). Compare *Ashley*, 66 F.3d at 167-68 (reaching the same holding pre-*Morgan*).[5] There is, accordingly, no reason to believe that the passage of time will lead all of these courts adopt the Eleventh Circuit's view.

EEOC. Respondent also makes no attempt to conceal the open conflict between the Eleventh Circuit's decision and the EEOC's interpretation of the Title VII limitations period as expressed in its Compliance Manual, its brief in this case, and prior administrative rulings. See EEOC COMPLIANCE MANUAL § 2-IV.C; EEOC Br. 1;[6] *Albritton* v. *Postmaster General*, No. 01A44063, 2004 WL 2983682, at *2 (EEOC Office of Fed. Op., Dec. 17, 2004). This disagreement has significant practical consequences given the EEOC's adjudicative authority over Title VII claims by federal employees. A federal employee may appeal an agency's denial of a disparate pay claim to the EEOC, whose decision is binding upon the agency. See 29 C.F.R. 1614.401, 1614.502. In such proceedings, the EEOC has recognized

---

[5] The District of Columbia Court of Appeals likewise recently "reconciled the Supreme Court's decisions in *Bazemore* and *Morgan*" by holding that "an employee may recover for discriminatorily low pay received within the limitations period because each paycheck constitutes a discrete discriminatory act." *Zuurbier* v. *Medstar Health, Inc.*, 895 A.2d 905, 913 n.13 (2005).

[6] Because the EEOC was simply an amicus below, it is not a party to this petition and, accordingly, the Solicitor General has not had occasion to express his view on the merits of this petition.

employees' right to challenge discriminatory pay checks issued during the Title VII limitations period, even if they implement decisions made outside that period. See, *e.g.*, *Amft* v. *Mineta*, No. 07A40116, 2006 WL 985183, at *5 (EEOC Office of Fed. Opp., Apr. 6, 2006); *Albritton*, *supra*. Accordingly, petitioner's claim would have been actionable if she had been a federal employee, but was foreclosed because she worked for Goodyear instead. That disparate treatment of similarly situated workers within the Eleventh Circuit is untenable and requires this Court's correction.

3. Respondent's assertion (BIO 19-22) that this case is a poor vehicle to decide the question presented is based on nothing more than an attempt to rehash the factual assertions rejected by both the jury and the district court (which found the jury's verdict "abundantly supported by the evidence," Pet. App. 12a.). As respondent acknowledges (BIO 20), the court of appeals did not pass on Goodyear's assertion that there was insufficient evidence to show that petitioner was denied raises prior to 1997 on the basis of sex. Respondent would, of course, be free to press that claim again upon remand if this Court reversed the Eleventh Circuit's statute of limitations holding. But this Court should not forgo this opportunity to resolve an important circuit conflict on a statute of limitations question simply because the defendant might eventually prevail upon the merits on remand.

In any event, the jury's verdict was well-founded. The evidence showed that by the time of her retirement, petitioner's annual salary during was as much as $20,688 less than her male peers in the same job and department in 1998. Def. Exh. 2, 3, 6, 48. Petitioner earned substantially less than the lowest paid male in the same job and department, even less than men whose performance was ranked the same or lower than hers. Tr. vol. II 257, 280; vol. III 358-59; Def. Exh. 48, 2, 3, 6. Moreover, unlike the men in her job, petitioner's pay often fell below even the minimum salary established by Goodyear's written policies. Tr. vol. II, 339, 360 ("[i]f you look at Lilly's present salary * * * at that time,

it was really below minimum"). And the jury was aware that the other two female Area Managers were also paid less than their male counterparts. See Pet. 3.

It is true that respondent proffered a non-discriminatory explanation for the disparity, including excuses for why it repeatedly passed over petitioner, but not similarly situated male supervisors, for raises. But the jury was not required to accept that story. The jury was entitled, for example, to take into account petitioner's direct evidence of discriminatory intent, including the plant manager's statement that "the plant did not need women," Tr. vol. I, 29, evidence to which respondent did not object, and that the court of appeals did not find inadmissible.[7] Having heard all the evidence, including the particular setting and context of petitioner's employment environment, it fell to the jury to decide the credibility of respondent's witnesses and their explanations. See *Ash* v. *Tyson Foods, Inc.*, 126 S. Ct. 1195, 1197 (2006). That conclusion is entitled to a strong presumption of validity which respondent has not overcome. *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149 (2000) ("[A] prima facie case and sufficient evidence to reject the employer's explanation may permit a finding of liability.").

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for certiorari, certiorari should be granted.

Respectfully submitted,

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[7] Respondent falsely claims that the court concluded this testimony was "hearsay upon hearsay." BIO 21. But the court was plainly referring to *other* testimony, regarding statements by supervisor Jerry Jones, not plant manager Richard O'Dell. See Pet. App. 35a n.27. And while the court thought the evidence insufficient to show that O'Dell was responsible for petitioner's proposed layoff in 1997, it reached no such conclusion regarding O'Dell's participation in the prior salary decisions. See *id.* 36a.

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June 5, 2006

Supreme Court, U.S.
FILED
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(8)

No. 05-1074

IN THE

Supreme Court of the United States

LILLY M. LEDBETTER,

Petitioner,

v.

GOODYEAR TIRE AND RUBBER COMPANY, INC.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

JOINT APPENDIX

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Petition for Certiorari filed February 17, 2006

Certiorari granted June 26, 2006

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U.S. District Court
Northern District of Alabama (Eastern)
CIVIL DOCKET FOR
CASE #: 1:99-cv-03137-UWC

Date Filed	#	Docket Text
11/24/1999	1	COMPLAINT filed, amount paid $ 150.00, receipt # 200145166 (PGS) (Entered: 11/24/1999)
02/28/2000	5	ANSWER by defendant Goodyear Tire & Rub w/appear by atty(s) Jay D St Clair filed cs (PGS) (Entered: 02/28/2000)
02/05/2001	15	MOTION by defendant Goodyear Tire & Rub for summary judgment filed cs (PGS) (Entered: 02/06/2001)
02/05/2001	16	SUBMISSION of discovery by defendant Goodyear Tire & Rub in support of motion for sj (See separate folder- Vols I & II too large for file) filed cs (PGS) (Entered: 02/06/2001)
02/06/2001	17	BRIEF by defendant Goodyear Tire & Rub in Support of Motion for Summary Judgment filed cs (PGS) (Entered: 02/06/2001)
02/27/2001	21	SUBMISSION of discovery by plaintiff Lilly M Ledbetter

		filed (Vols I & II) [see separate folder] cs (PGS) (Entered: 02/28/2001)
02/27/2001	22	BRIEF by plaintiff Lilly M Ledbetter in opposition to dft's motion for summary judgment filed cs (PGS) (Entered: 02/28/2001)
01/31/2002	26	BRIEF (Reply) by defendant Goodyear Tire & Rubbber in support of the motion for summary judgment w/exhs att filed cs (Received in Judge Ott's chambers on 3/13/01) (PGS) Modified on 01/31/2002 (Entered: 01/31/2002)
04/03/2002	28	Report and Recommendation that the motion for summary judgment be granted in part and denied in part as set out filed (by Magistrate-Judge John E. Ott) motion for summary judgment cm (PGS) (Entered: 04/03/2002)
04/03/2002	29	ORDER Case reassigned to Chief Judge U W. Clemon filed (by Magistrate-Judge John E. Ott) cm (PGS) (Entered: 04/03/2002)
04/24/2002	30	MOTION by pla to extend time to w/i (10) days of 4/23/02 to file objection to the RR filed cs (DWC) (Entered:

		04/24/2002)
05/07/2002	32	OBJECTIONS by pla to RR [28-1] filed cs (DWC) (Entered: 05/07/2002)
07/31/2002	33	MEMORANDUM opinion on objections to the Magistrate Judge's Report & Recommendation filed (by Chief Judge U W. Clemon) cm (DWC) (Entered: 07/31/2002)
07/31/2002	34	ORDER, in conformity w/ the Memorandum Opinion on objections to the Magistrate Judge's R&R, SUMMARY JUDGMENT is GRANTED in favor of dft on certain claims as stated & DENIED on other claims [15-1] filed by Chief Judge U W. Clemon) cm (DWC) (Entered: 07/31/2002)
08/26/2002	35	ORDER on pre-trial hearing ; PTC held 1:30 8/19/02 ; jury trial set 12/9/02, Anniston, AL filed (by Chief Judge U W. Clemon) cm (DWC) (Entered: 08/26/2002)
01/21/2003		COURTROOM NOTES: JURY TRIAL at Anniston, AL - before the Honorable U. W. Clemon, CUSDJ - opening remarks of the court - juror Inzer and Heacock excused for

		cause - jury selected and sworn - opening remarks of the court to the jury - opening statements of counsel - plaintiff's testimony - daily adj. - (Penny Enoch, rptr.) (DGS) (Entered: 01/24/2003)
01/22/2003		COURTROOM NOTES: JURY TRIAL (UWC) - trial resumed - plaintiff's testimony resumed - plaintiff rests - defendant's testimony - defendant rests - daily adj. - (Penny Enoch) (DGS) (Entered: 01/24/2003)
01/22/2003	56	MOTION by defendant Goodyear Tire & Rub for judgment as a matter of law on the plaintiff's pay claim - filed cs (DGS) (Entered: 01/24/2003)
01/22/2003	59	56 - ORDER denying dft's motion for judgment as a matter of law [56-1] (by Chief Judge U W. Clemon) entered cm (DWC) (Entered: 01/28/2003)
01/23/2003		COURTROOM NOTES: JURY TRIAL (UWC) - trial resumed - closing arguments of counsel - court's oral charge to the jury - jury deliberations begin - daily adj. - (Penny

		Enoch, rptr.) (DGS) (Entered: 01/24/2003)
01/24/2003		COURTROOM NOTES: JURY TRIAL (UWC) - trial resumed - jury deliberations continued - written response of the court to the jury - jury verdict filed this day - written order to be entered by the court - (Penny Encoh, rptr.) (DGS) (Entered: 01/24/2003)
01/24/2003	58	VERDICT for plaintiff Lilly M Ledbetter against defendant Goodyear Tire & Rub filed (DGS) (Entered: 01/24/2003)
01/28/2003	60	ORDER (Judgment) filed: based solely on the Special Verdict of the Jury, JUDGMENT in the amt $3,843,014.93 ENTERED in favor of pla & against dft; a reasonable atty's fee & costs are taxed against dft (by Chief Judge U W. Clemon) to dismiss case cm (DWC) (Entered: 01/28/2003)
02/07/2003	63	RENEWED MOTION by dft for judgment as a matter of law , and, in the alternative, for new trial or remittitur filed cs (DWC) (Entered: 02/10/2003)
02/07/2003	65	BRIEF by dft in support of its Renewed motion for judgment

		as a matter of law w/attachments filed cs (DWC) (Entered: 02/10/2003)
05/09/2003	73	OPPOSITION by pla to dft's motion for judgment as a matter of law [63-1], motion for new trial or remittitur [63-2] filed cs [bound filed in expandable folder] (DWC) (Entered: 05/12/2003)
06/02/2003	76	NOTICE of compliance (pla's lost wages submission) by pla with the court's 5/30/03 hearing w/exhs atta filed cs (DWC) (Entered: 06/03/2003)
06/03/2003	77	OBJECTIONS by dft to pla's lost wages submission [76-1] filed cs (DWC) (Entered: 06/04/2003)
06/04/2003	78	REPLY by pla to dft's objection to lost wage submission [77-1] filed cs (DWC) (Entered: 06/05/2003)
09/24/2003	79	MEMORANDUM opinion on post-trial motions filed (by Chief Judge U W. Clemon) cm (KWC) (Entered: 09/24/2003)
09/24/2003	80	ORDER on post-trial motions; denying pla's motion for attorney fees & expenses [62-1], without prejudice to its

		automatic reinstatement in event that pla agrees to remittitur; granting motion for judgment as a matter of law [63-1] solely to entent that jury's award of 328,597.93 in backpay is VACATED; in all other respects, motion for judgment as a matter of law is DENIED; dft's alternative motion for a remittitur is GRANTED; jgmt previously entered in case is hereby REDUCED to $360,000.00 conditioned on pla's filing her assent to remittitur w/in 15 days of this order; denying motion for new trial [63-2] on condition that pla assents to remittitur. Should pla fail to assent to remittitur w/in time fixed, court will reconsider motion sua sponte and GRANT it on issue of damages only; filed (by Chief Judge U W. Clemon) cm (KWC) (Entered: 09/24/2003)
10/14/2003	87	NOTICE of appeal by defendant Goodyear Tire & Rub from District Court decision [80-1] ; notice of appeal, order appealed from and court copy of docket entries w/transmittal letter mailed cm (BST) (Entered:

		10/15/2003)
10/24/2003		NOTIFICATION by Circuit Court of Appellate docket number #03-15264-G (KWC) (Entered: 10/24/2003)
11/04/2005	96	USCA JUDGMENT as to 87 Notice of Appeal; It is hereby ORDERED that the attached Opinion is entered as Judgment, the USDC judgement is REVERSED and INSTRUCTED to Dismiss plaintiff Ledbetter's complaint with prejudice, Issued As Mandate 11/03/2005 (SRJ,) (Entered: 11/07/2005)
11/21/2005	97	ORDER OF DISMISSAL with prejudice w/costs hereby taxed against plaintiff consistent with U.S. Court of Appeals-11th Circuit's Mandate 11/2/2005. Signed by Judge U W Clemon on November 21, 2005. (SRJ,) (Entered: 11/21/2005)

General Docket
United States Court of Appeals for the Eleventh Circuit
No. 03-15264-GG

Lilly M. Ledbetter v. Goodyear Tire & Rubber

File Date	Entry	Party	Pending
10/21/2003	DKT2 (Docketing - Regular Notice) issued. cc: Perry D. Mathis To: St. Clair, Jay Daniel cc: Estes, Kathy H. cc: Kent, Ronald H., Jr. cc: Quinn, C. Michael cc: Goldfarb, Jon Craig cc: Weiner, Maury Steven		No
10/24/2003	Civil Appeal Statement Form:	Goodyear Tire and Rubber Company, Inc.	No
01/15/2004	Record Excerpts: (Atty: Jay Daniel St. Clair)	Goodyear Tire and Rubber Company, Inc.	No
01/16/2004	E-Brief Tendered: Appellant by Kelly H. Estes for Goodyear Tire and Rubber Company, Inc.	Goodyear Tire and Rubber Company, Inc.	No
01/20/2004	Appellant Brief Filed: (Atty: Jay Daniel St. Clair)	Goodyear Tire and Rubber	No

		Company, Inc.	
02/26/2004	E-Brief Tendered: Appellee by Jon Craig Goldfarb for Lilly M. Ledbetter	Lilly M. Ledbetter	No
02/26/2004	Certificate of Readiness		No
03/01/2004	Appellee Brief Filed: (Atty: C. Michael Quinn)	Lilly M. Ledbetter	No
03/12/2004	Record on Appeal		No
03/12/2004	Exhibits: (Atty: Jay Daniel St. Clair)	Goodyear Tire and Rubber Company, Inc.	No
03/15/2004	E-Brief Tendered: Reply by Kelly H. Estes for Goodyear Tire and Rubber Company, Inc.	Goodyear Tire and Rubber Company, Inc.	No
03/16/2004	Reply Brief Filed: (Atty: Jay Daniel St. Clair)	Goodyear Tire and Rubber Company, Inc.	No
09/16/2004	Oral Argument Scheduled: 09/16/04		No
08/23/2005	Judgment Entered		No
08/23/2005	Opinion Issued-REVERSED		No
09/13/2005	Petition for Rehearing En Banc: (Atty: C. Michael Quinn)	Lilly M. Ledbetter	No

09/15/2005	Motion to File Amicus Petition for Rehearing from EEOC		No
10/26/2005	Motion of the EEOC for leave to file a brief as amicus in support of petition for rehearing en banc filed by the appellee, Ledbetter is GRANTED. GBT/JFD/WHP		No
10/26/2005	The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, the Petition(s) for Rehearing En Banc are DENIED.		No
10/26/2005	Amicus brief of EEOC in support of Appellee.:	Equal Employment Opportunity Commission	No
11/03/2005	CASE CLOSED-Mandate Issued		No
01/17/2006	Ext. for Filing Certiorari Granted: to 2/17/06 App#05A633	Lilly M. Ledbetter	No
02/27/2006	Notice of Filing Certiorari: #05-1074(Atty: Jay Daniel St. Clair)	Goodyear Tire and Rubber Company, Inc.	No

07/03/2006	Certiorari Granted: SC# 05-1074	Goodyear Tire and Rubber Company, Inc.	No

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

LILLY M. LEDBETTER	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**CIVIL ACTION NO:**
	)	**JURY DEMAND**
GOODYEAR TIRE AND	)	
RUBBER COMPANY,	)	
INC.,	)	
	)	
Defendant.	)	

COMPLAINT

I. JURISDICTION

1. The jurisdiction of this Court is invoked pursuant to the Act of Congress known as 28 U.S.C. §§ 1331, 1334(4), 2201, 2202, 42 U.S.C. § 2000e et seq., 29 U.S.C. §206(d) and 29 U.S.C §621 et seq. This suit is authorized and instituted pursuant to Title VII of the Act of Congress known as the "Civil Rights Act of 1964," as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e et seq., the "Equal Pay Act" of the "Fair Labor Standards Act", 29 U.S.C. §206(d) and 29 U.S.C. 215(a)(3) and the "Age Discrimination in Employment Act", 29 U.S.C. §621 et seq. The jurisdiction of this Court is invoked to secure protection of and redress deprivation of rights secured by 42 U.S.C. § 2000 et seq., providing for injunctive and other relief against sex discrimination, and by 29 U.S.C. §206(d) providing for relief for sex discrimination in compensation, and by 29 U.S.C. §621 et seq. providing for injunctive and other relief against age discrimination.

2. The plaintiff timely filed her charge of sex discrimination with the Equal Employment Opportunity Commission (E.E.O.C.) within 180 days after the last discriminatory treatment and has timely filed this complaint within 90 days of receiving her Right-To-Sue Letter from the E.E.O.C.

II. PARTIES

3. The plaintiff, Lilly M. Ledbetter, hereinafter "Plaintiff", is a female born on April 14, 1938. She is a resident of the State of Alabama and a citizen of the United States and was so during the relevant time period of this complaint.

4. The defendant, Goodyear Tire and Rubber Company, hereinafter "Defendant", is an entity subject to suit under Title VII of the Act of Congress known as the "Civil Rights Act of 1964," as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e et seq. The defendant is an entity subject to suit under the "Equal Pay Act", 29 U.S.C. §206(d). The defendant is an entity subject to suit under the ADEA, 29 U.S.C. §621, et seq. The defendant employs at least twenty (20) persons.

III. FACTS

5. The plaintiff was employed by defendant from February 5, 1979, until October 31, 1998, when the defendant forced her into early retirement.

6. The plaintiff worked as an Area Manager in the Tire Room at the Gadsden Goodyear plant from November 1, 1985, until January 3, 1998, and was the only female manager out of sixteen managers.

7. In June of 1998, the defendant required the plaintiff to transfer to the position of Technical Engineer.

8. On October 31, 1998, the defendant forced the plaintiff into early retirement.

IV. COUNT I – Equal Pay Act

9. The plaintiff re-alleges and incorporates by reference paragraphs 1-8 above with the same force and effect as if fully set out in specific detail herein below.

10. As an Area Manager, the plaintiff was similarly situated with her male co-workers and was doing equal work in the same establishment.

11. However, the plaintiff's male co-workers who were doing identical work were paid at a higher rate than she.

12. The plaintiff was involuntarily transferred to the position of Technical Engineer in June of 1998. After her transfer, the plaintiff was again paid at a lower rate than similarly situated male Technical Engineers doing identical work in the same establishment.

13. The defendant willfully and maliciously discriminated against the plaintiff in pay because of her sex.

V. Count II – Title VII Disparate Treatment

A. Discrimination in Wages

14. The plaintiff performed work equal or substantially equal to that of the male Area Managers, but received less pay for a substantially similar job.

15. The defendant had a practice of offering overtime work first to male Area Managers. The defendant offered overtime to the plaintiff only after each male turned down the offer, even though the plaintiff expressed interest in working overtime.

B. Discrimination in Evaluation

16. In January of 1998, the plaintiff received a discriminatory evaluation in which she received a low score while men performing the same job in the same manner as she received a higher evaluation score.

C. Discrimination in Terms and Conditions of Employment

17. The plaintiff's male supervisors and co-workers intentionally isolated her by excluding her.

18. For example, Jerry Jones, the Business Center Manager, regularly excluded the plaintiff from division meetings that he conducted with only the male Area Managers present.

D. The Transfer to Technical Engineer

19. The plaintiff was involuntarily transferred from the position of Area Manager to that of Technical Engineer on January 5, 1998. This position removed the plaintiff's supervisory responsibilities.

20. This transfer effectively prohibited the plaintiff from receiving more pay increases and reduced her retirement income.

21. The plaintiff was the only Area Manager transferred out of the sixteen (16) Area Managers.

22. After transferring the plaintiff out of the Area Manager position, the defendant filled her position with a man.

23. After the plaintiff's removal from the Area Manager position, there were no female Area Managers.

24. The defendant's act of forcing the plaintiff to transfer to the Technical Engineer job was a clear intent to cause her resignation as the Technical Engineer position required the plaintiff to do extensive manual labor including lifting two hundred and fifty (250) eighty (80) pound tires off of one truck and onto another.

25. The plaintiff was the only woman in that position.

26. Despite the grueling physical barriers the defendant threw in front of the plaintiff, the plaintiff did her job.

E. Disparate Treatment in Training and Discipline

27. The plaintiff received no training for the Technical Engineer position, and there was no job procedure manual or written job description available to the plaintiff.

28. The plaintiff was suspended for 3 days for allegedly making an error that similarly situated men made and were not suspended.

VI. Count III – Age Discrimination in Employment Act Disparate Treatment

29. The plaintiff re-alleges and incorporates by reference paragraphs 1-28 above with the same force and effect as if fully set out in specific detail herein below.

30. Plaintiff was over age 40 at the time of the relevant acts of discrimination. Out of the 20 Area Managers, the plaintiff was the oldest.

31. The defendant willfully discriminated against the plaintiff because of her age by transferring her to the position of Technical Engineer.

32. When the plaintiff was transferred to the position of Technical Engineer, her Area Manager position was filled by a younger male named Steve Thompson, her former co-worker. In turn, the defendant promoted a male in his twenties (20's) into the Area Manager position vacated by Thompson.

33. Significantly younger Area Managers received substantially higher salaries than the plaintiff for substantially equal work.

34. The defendant disciplined the plaintiff by suspending her for three days from her position as Technical Engineer when similarly situated Technical Engineers younger than the plaintiff were not disciplined for committing similar errors.

VII. Count IV – Retaliation in Violation of the Equal Pay Act, and Title VII

35. In the fall of 1997, the plaintiff objected to the defendant's discriminatory pay practice by complaining to her supervisor, Jerry Jones, that she was being paid unfairly compared to her male co-workers performing similarly in equal positions.

36. Shortly thereafter, Jones instructed the plaintiff that it was in her own best interest to interview for and accept the position of Technical Engineer.

37. In January of 1999, the defendant moved the plaintiff to that position.

38. The defendant has further retaliated against the plaintiff by failing to re-hire her. The plaintiff properly applied for an Area Manager position at Goodyear on November 8, 1999. The Employment Specialist, Don Gardner, told her that they are not rehiring for Area Manager positions.

39. However, there are five (5) Area Manager positions available and at least one male Area Manager who retired was rehired. To this date, the defendant has refused to rehire the plaintiff.

VIII. Count V – Constructive Discharge

40. The plaintiff re-alleges and incorporates by reference paragraphs 1-39 above

with the same force and effect as if fully set out in specific detail herein below.

41. The defendant created an environment so hostile and abusive that the

plaintiff suffered depression requiring medical treatment.

42. Eventually, the terms and conditions of her Technical Engineer job and the unwarranted discipline by the defendant forced the plaintiff into resignation against her will.

IX. PRAYER FOR RELIEF

WHEREFORE, the plaintiff respectfully prays that this Court assume jurisdiction of this action and after trial:

1. Issue a declaratory judgment that the employment policies, practices, procedures, conditions and customs of the defendant, Goodyear, are violative of the rights of the plaintiff as secured by Title VII of the Act of Congress known as the "Civil Rights Act of 1964," as amended, 42 U.S.C. § 2000e et seq., the "Equal Pay Act", 29 U.S.C. §206(d) and 29 U.S.C. 215(a)(3) and the "Age Discrimination in Employment Act", 29 U.S.C. §621 et seq.

2. Grant the plaintiff a permanent injunction enjoining the defendant, Goodyear, its agents, successors, employees, attorneys and those acting in concert with the defendants, from continuing to violate Title VII of the Act of Congress known as the "Civil Rights Act of 1964," as amended, 42 U.S.C. § 2000e et seq. and the "Equal Pay Act", 29 U.S.C. §206(d) and 29 U.S.C. 215(a)(3) and the "Age Discrimination in Employment Act", 29 U.S.C. §621 et seq

3. Enter an Order requiring the defendant to make the plaintiff whole by awarding her reinstatement, lost wages (plus interest), liquidated damages, compensatory and

punitive damages, front pay and loss of benefits including retirement, pension seniority and other benefits of employment.

4. The plaintiff further prays for such other relief and benefits as the cause of justice may require, including, but not limited to, an award of costs, attorneys' fees and expenses.

THE PLAINTIFF DEMANDS
A TRIAL BY STRUCK JURY

Respectfully submitted,

Jon C. Goldfarb (GOL015)
Susan W. Bullock
Attorneys for Plaintiff

OF COUNSEL:
GORDON SILBERMAN WIGGINS & CHILDS, P.C.
1400 SouthTrust Tower
Birmingham, Alabama 35203
(205) 328-0640

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

LILLY M. LEDBETTER,	)	
Plaintiff,	)	
v.	)	**CIVIL ACTION NO. CV--99-JEO-3137-E**
GOODYEAR TIRE AND RUBBER COMPANY, INC.,	)	
Defendant.	)	

ANSWER

COMES NOW Defendant, Goodyear Tire and Rubber Company, Inc. ("Goodyear"), and for answer to plaintiff's complaint, states as follows:

FIRST DEFENSE

To the extent Plaintiff seeks to recover under Title VII, as amended, for events occurring more than 180 days before she filed her EEOC charge, such claims are barred by

Plaintiff's failure to file a timely charge of discrimination, a necessary condition precedent to suit.

SECOND DEFENSE

To the extent Plaintiff has not filed her Complaint within ninety (90) days of the date she received her Notice of Right to Sue from the EEOC, her claims under Title VII, as amended, are untimely.

THIRD DEFENSE

To the extent Plaintiff seeks recovery under Title VII, as amended, for events that are not like or related to the allegations in her EEOC charge she has failed to satisfy a necessary condition precedent to suit.

FOURTH DEFENSE

To the extent Plaintiff's claims occurred beyond the applicable statutes of limitations period, those claims are barred.

FIFTH DEFENSE

Plaintiff's claims for equitable relief may not be tried before a jury.

SIXTH DEFENSE

To the extent that Plaintiff's Complaint challenges employment decisions affecting her, such decisions were made on the basis of legitimate non-discriminatory factors. To the extent a fact finder finds otherwise, Goodyear would nevertheless have made the same decisions regarding Plaintiff.

SEVENTH DEFENSE

To the extent Plaintiff has failed to satisfy her duty to mitigate her damages, Plaintiff's claims for backpay should be dismissed.

EIGHTH DEFENSE

Plaintiff's claims are barred in whole or in part by the doctrines of unclean hands, waiver, laches, and estoppel.

NINTH DEFENSE

Plaintiff's damages under Title VII, if any, are subject to limitations found at 42 U.S.C. ' 1981a(b)(3).

TENTH DEFENSE

Plaintiff is not entitled to an award of punitive damages as she has not pled and cannot prove facts sufficient to support an award under applicable law.

ELEVENTH DEFENSE

An award of punitive damages against Goodyear would violate the constitutions of the United States and the State of Alabama.

TWELFTH DEFENSE

Plaintiff cannot recover punitive damages against defendant because such an award, which is penal in nature, would violate defendant's constitutional rights protected under the Alabama Constitution of 1901, as amended (the "Alabama Constitution"), and the Constitution of the United States (the "United States Constitution"), unless defendant is afforded the same procedural safeguards as are criminal defendants, including, but not limited to, the right to avoid self-incrimination, the right to forego production and

disclosure of incriminating documents, and the right to the requirement of a level of proof beyond a reasonable doubt.

THIRTEENTH DEFENSE

Based upon Alabama procedures relative to punitive damages, which provide no objective, logical, or reasonable standards or criteria which govern the award, and the amount of the award, of punitive damages, Goodyear is denied equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution, and Article 1, " 1, 6, and 22 of the Alabama Constitution, separately and severally.

FOURTEENTH DEFENSE

Goodyear adopts all defenses made available to it under the decision rendered by the United States Supreme Court in BMW of North America, Inc. v. Gore, 116 S. Ct. 1589 (1996).

FIFTEENTH DEFENSE

Plaintiff is not entitled to an award of punitive damages because Goodyear made a good faith effort to comply with Title VII.

SIXTEENTH DEFENSE

For answer to the numbered paragraphs of Plaintiff's Complaint, Goodyear says as follows:

1) Goodyear admits that this Court has subject matter jurisdiction over all claims brought by this Plaintiff pursuant to Title VII of the Civil Rights Act of 1964, as amended. Goodyear denies that it has in any way violated that statute, that Plaintiff is entitled to any relief and that Plaintiff may try any claims for equitable relief before a jury.

2) Goodyear admits that Plaintiff was employed by Goodyear in Butler County, Alabama, which is in the Middle District of the State of Alabama.

3) Upon information and belief, Goodyear admits that Plaintiff is black, over 19 years of age, and a

citizen of the United States and the State of Alabama, residing in Butler County, Alabama.

4) Goodyear

5) No response is required. However, Goodyear denies that it has violated any law or that Plaintiff is entitled to any relief whatsoever from Goodyear.

6) Goodyear admits that plaintiff is black. Otherwise, Goodyear denies the allegations in Paragraph 6 of the Complaint.

7) Goodyear denies the allegations in Paragraph 7 of the Complaint.

8) Goodyear denies the allegations in Paragraph 8 of the Complaint.

9) Goodyear denies the allegations in Paragraph 9 of the Complaint.

10) Goodyear readopts and herein reincorporates its previous responses.

11) Goodyear admits the allegations in Paragraph 11 of the Complaint, except that Goodyear's corporate records indicate that plaintiff was hired by

12) Goodyear denies the allegations in Paragraph 12 of the Complaint.

13) Goodyear admits the allegations in Paragraph 13 of the Complaint, except that Goodyear's records indicate that Plaintiff's transfer was effective

14) Goodyear admits that Plaintiff's pay went from $350.00 per week to $6.25 per hour after the transfer and that her benefits were changed.

15) Goodyear admits that plaintiff was replaced as manager by (white, female). Otherwise, denied.

16) Goodyear admits that made the decision to demote Plaintiff from manager to assistant manager.

17) Goodyear admits that the Equal Employment Opportunity Commission received plaintiff's Charge of Discrimination complaining of adverse treatment on

18) Goodyear admits that plaintiff's position as assistant manager required her to work fewer hours and that Plaintiff quit effective. Otherwise, Goodyear denies the allegations in Paragraph 18 of the Complaint.

19) Goodyear denies the allegations in Paragraph 19 of the Complaint.

20) Goodyear denies the allegations in Paragraph 20 of the Complaint.

21) Goodyear readopts and herein reincorporates its previous responses.

22) Goodyear admits the allegations in Paragraph 22 of the Complaint.

23) Goodyear denies the allegations in Paragraph 23 of the Complaint.

24) Goodyear admits that Plaintiff was demoted from manager to assistant manager. Otherwise, denied.

25) Goodyear denies the allegations in Paragraph 25 of the Complaint.

26) Goodyear denies the allegations in Paragraph 26 of the Complaint.

27) Goodyear admits the allegations in Paragraph 27 of the Complaint.

28) Goodyear denies the allegations in Paragraph 28 of the Complaint.

29) Goodyear admits that Plaintiff was demoted from manager to assistant manager. Otherwise, denied.

30) Goodyear denies the allegations in Paragraph 30 of the Complaint.

31) Goodyear denies the allegations in Paragraph 31 of the Complaint.

32) Goodyear admits that Plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission.

33) Goodyear denies the allegations in Paragraph 33 of the Complaint.

34) Goodyear denies the allegations in Paragraph 34 of the Complaint.

35) Except to the extent expressly admitted, Goodyear denies all allegations in the Complaint.

WHEREFORE, Goodyear demands a judgment in its favor and an award of its costs in defending this action.

Ronald H. Kent, Jr.
(KEN030)

Attorney for Defendant
Goodyear Tire and Rubber Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing on:

Jon C. Goldfarb
Susan W. Bullock
Gordon, Silberman Wiggins & Childs, P.C.
1400 SouthTrust Tower
Birmingham, Alabama 35203

by placing a copy of same in the United States Mail, first-class postage prepaid and addressed to his regular mailing address, on this ____th day of February, 2000.

OF COUNSEL

[*23]

BY MR. GOLDFARB:

Q. MRS. LEDBETTER, WHERE WERE YOU BORN AND RAISED?

A: CALHOUN COUNTY, ALABAMA.

Q. AND ARE YOU MARRIED?

A. YES, I AM.

Q. IS THIS YOUR HUSBAND BACK HERE?

A. YES, SIR.

Q. HOW LONG HAVE YOU BEEN MARRIED?

A. 47 YEARS.

Q. WHAT IS YOUR DATE OF BIRTH?

A. APRIL 14TH, 1938. I'M 64 YEARS OLD.

Q. TELL ME BRIEFLY WHAT YOUR EDUCATIONAL BACKGROUND IS.

A. FINISHED JACKSONVILLE HIGH SCHOOL, AND I HAVE APPROXIMATELY

SIXTY HOURS OF COLLEGE CREDIT.

Q. WHERE DO YOU GO TO COLLEGE?

A. JACKSONVILLE STATE, GEORGIA, AND I HAVE SOME CLASSES FROM [*24] MEMPHIS STATE UNIVERSITY AND AUBURN.

Q. WHAT YEAR DID YOU START WORKING AT THE GOODYEAR COMPANY?

A. FEBRUARY 5TH, 1979.

Q. PRIOR TO THAT, WHAT DID YOU DO, BRIEFLY?

A. I WAS – WORKED FOR GENERAL ELECTRIC AND THEN I STAYED HOME

FOR TEN YEARS TO RAISE MY CHILDREN. AND THEN I WENT TO WORK FOR JACKSONVILLE STATE UNIVERSITY, ASSISTANT FINANCIAL AID DIRECTOR. AND WHEN I WENT TO GOODYEAR, I WAS A DISTRICT MANAGER FOR H & R BLOCK. I MANAGED FOURTEEN LOCATIONS.

Q. WHEN YOU STARTED AT GOODYEAR IN FEBRUARY OF '79, WHAT JOB DID YOU START IN?

A. I WAS HIRED IN ON THE SQUAD, WHICH WAS SUPERVISOR'S TRAINING PROGRAM, AND LATER I BECAME A SUPERVISOR.

Q. HOW LONG, APPROXIMATELY, DID YOU WORK AS A SUPERVISOR AT THE GOODYEAR PLANT?

A. MY ENTIRE CAREER, EXCEPT FOR THOSE LAST FEW MONTHS OF 1998 AS A TECHNOLOGIST SPECIALIST.

Q. WE'VE HEARD SOMETHING CALLED AREA MANAGER. AT SOME POINT IN TIME, DID THE TITLE CHANGE?

A. YES, IT WAS A SUPERVISOR. AND IN 1985, THEY CHANGED THE JOB DESCRIPTION SOMEWHAT, ADDED ADDITIONAL RESPONSIBILITY TO THE JOB, AND IT CHANGED TO AREA MANAGER AT THAT TIME.

Q. WHEN THE JOB TITLE CHANGED OVER TO AREA MANAGER, WERE YOU REQUIRED TO GO THROUGH SOME SPECIAL TRAINING? **[*25]**

A. YES, WE WERE.

Q. WHAT WAS THAT FOR?

A. THAT WAS IN ORDER TO PREPARE US AND HAVE US READY TO SUPERVISE THE MAINTENANCE AND ELECTRICIAN PEOPLE.

Q. WERE YOU TESTED ON THAT TRAINING ON ELECTRICAL AND MECHANICAL?

A. YES, I WAS.

Q. HOW DID YOU SCORE ON THAT TEST IN COMPARISON TO ALL THE MEN THAT YOU WERE WORKING WITH?

A. WITH THE MECHANICAL, I FINISHED SECOND OUT OF ALL THE 44 TO 60 PEOPLE; AND THE ELECTRICIAN'S TEST, I FINISHED FOURTH OUT OF ALL OF THEM. AND THEN WHEN YOU AVERAGED THE TWO GRADES TOGETHER, I FINISHED SECOND.

* * * * *

[*29]

Q. DID THE PLANT MANAGER, RICHARD ODELL, SAY ANYTHING THAT INDICATED THAT YOU WERE NOT WELCOME THERE AS A WOMAN?

A. YES, SIR.

Q. WHAT DID HE SAY TO YOU?

A. HE SAID THAT – THAT THAT PLANT DID NOT NEED WOMEN, THAT WE DIDN'T HELP IT, WE CAUSED PROBLEMS.

* * * * *

[*30]

Q. NAME FOR ME THE OTHER WOMEN THAT YOU KNOW OF THAT WORKED AS AREA MANAGERS WHEN YOU WERE AN AREA MANAGER.

A. JOANNE FIRESTONE WAS THERE FOR A FEW YEARS. SHE QUIT. CATHY ROBERTSON, SHE WAS AN AREA MANAGER. SHE CAME ON

BOARD ABOUT 1993, AND I BELIEVE SHE QUIT IN 1998.

Q. DO YOU KNOW OF ANY OTHER WOMEN WHO WORKED AS AREA MANAGERS?

A. NOT WHILE I WAS THERE. I CAN'T THINK OF ANY RIGHT NOW.

Q. APPROXIMATELY, SO WE AN GET AN UNDERSTANDING – THERE'S YOU AND THOSE TWO OTHER WOMEN FOR A SHORT PERIOD OF TIME – APPROXIMATELY HOW MANY MEN WORKED AS AREA MANAGERS?

A. PROBABLY SOMEWHERE IN THE NEIGHBORHOOD OF EIGHTY.

Q. DURING THAT ENTIRE PERIOD?

A. DURING MY ENTIRE CAREER.

Q. DO YOU KNOW OF ANY WOMAN WHO WORKED AS AN AREA MANAGER FOR AS LONG AS YOU DID?

A. NO, SIR, I DO NOT.

* * * * *

[*31]

Q. WHEN YOU STARTED AT GOODYEAR, WHO WERE THE OTHER MALES THAT STARTED OFF WORKING WITH YOU, CONTINUED TO

WORK WITH YOU, UP UNTIL THE END OF YOUR EMPLOYMENT?

A. STEVE THOMPSON, DAVID BARNES, JIMMY TODD, TERRY AMBERSON, DONALD MYERS.

Q. OKAY. HAVE YOU HAD AN OPPORTUNITY TO GO THROUGH THE – THE FIVE MEN – THOSE FIVE MEN – HAVE YOU HAD AN OPPORTUNITY TO LOOK AT THEIR PAY RECORDS IN COMPARISON TO YOURS?

A. YES, SIR, I HAVE.

Q. HAVE YOU LOOKED AT THEIR PAY RECORDS UP UNTIL THE PRESENT?

A. YES, SIR.

Q. AND WHEN YOU WERE LOOKING AT THEIR PAY RECORDS, DID YOU ASSIST MY PARALEGAL IN GOING GO THROUGH AND CREATING A CHART?

A. YES, WE DID.

(MR. GOLDFARB HOLDING LARGE CHART.)

THE COURT: DON'T SHOW IT TO THE JURY UNTIL IT'S RECEIVED IN EVIDENCE.

MR. GOLDFARB: OKAY.

Q. THIS IS A CHART – IS THIS A CHART THAT YOU CREATED, MRS. LEDBETTER?

A. YES, SIR, IT IS.

* * * * *

[*34]

Q. QUICKLY, JUST RUNNING THROUGH THIS, ON APRIL 1ST, 1979, WHAT WAS YOUR SALARY AND THE SALARY OF THE MEN AT THAT TIME?

A. EACH OF US WAS MAKING $16,760.52.

Q. AND THEN OCTOBER 1979, WHAT WAS YOUR SALARIES?

A. EACH OF US CONTINUED TO KEEP THE SAME SALARY AT $18,216.96.

Q. DID YOU CONTINUE TO HOLD THE SAME JOB TITLE THAT THESE MEN HELD DURING YOUR CAREER?

A. YES, SIR, I DID.

Q. THEY WERE ARE MANAGERS AND YOU WERE AN AREA MANAGER?

A. YES, SIR.

* * * * *

[*36]

Q. LET'S JUST TALK ABOUT MR. MAUDSLEY.

A. OKAY.

Q. DID MR. MAUDSLEY – WHAT WAS HIS JOB AT THAT PARTICULAR TIME, WHAT DID HE DO TO YOU?

A. HE WAS MY BUSINESS CENTER MANAGER, OR AT THAT TIME, THEY WERE CALLED DEPARTMENT FOREMEN. HE WAS RATING ME, DOING THE ANNUAL EVALUATIONS.

AND HE TOLD ME THAT IF I WOULD MEET HIM OVER AT THE RAMADA INN IN ATTALLA, THAT I POSSIBLY COULD MOVE UP FROM BEING EVALUATED ELEVEN OUT OF TWELVE, WHICH IS NEAR THE BOTTOM; OR I MIGHT BE UP TO FIVE OR MAYBE EVEN A THREE.

Q. WHAT ELSE DID MR. MAUDSLEY SAY?

A. AND HE SAID IF I DIDN'T DO THAT, THAT I WOULD NOT GET EVALUATED VERY HIGHLY. AND I ASKED HIM HOW COULD HE DO THAT, BASED ON MY JOB [*37] PERFORMANCE. AND HE SAID IT WAS MORE IMPORTANT AT GOODYEAR THAT MY BOSSES LIKED ME THAN ME TO DO A GOOD JOB.

THE COURT: NOW, LADIES AND GENTLEMEN, LET ME GIVE YOU A CAUTIONARY INSTRUCTION. YOU SHOULD NOT RECEIVE THIS TESTIMONY AND EVIDENCE FOR THE PURPOSE OF ASSESSING DAMAGES,

BECAUSE IT OCCURRED TOO FAR BACK IN TIME OF LIABILITY FOR THE COMPANY.

Q. WHAT DID YOU DO AFTER MR. MAUDSLEY MADE THAT COMMENT TOWARDS YOU?

A. WELL, I TRIED TO HANDLE IT MYSELF FOR A WHILE AND IT CONTINUED TO GET WORSE, SO I WENT TO JERRY JONES FOR ASSISTANCE. BECAUSE AT THAT TIME, HE WAS IN H.R. AND HE WAS PERSONNEL SPECIALIST IN THE RADIAL PLANT.

Q. SO, JERRY JONES IS THE NAME OF THIS – HE WAS A PERSONNEL SPECIALIST?

A. THAT'S WHAT I KNEW HIM AS.

Q. SO YOU WENT TO JERRY JONES, AND WHAT DID YOU SAY TO HIM?

A. I TOLD HIM I NEEDED SOME ASSISTANCE, I WAS BEING HARASSED; AND I NEEDED TO EITHER BE MOVED OR I NEEDED SOMEBODY TO HELP ME IN REGARDS TO MY SITUATION.

Q. WHAT DID JERRY JONES SAY TO YOU WHEN YOU TOLD HIM ABOUT

WHAT MR. MAUDSLEY HAD DONE ABOUT THE SEXUAL HARASSMENT? WHAT DID HE SAY?

A. HE TOLD ME I WAS A TROUBLEMAKER, AND THAT MR. – WE'RE NOT TALKING ABOUT – HE SAID THAT THESE MEN HAD GOOD

CAREERS [*38] AT GOODYEAR AND THEY WERE NOT GOING TO DISMISS THEM; AND THAT GOODYEAR REALLY DIDN'T NEED TROUBLEMAKERS LIKE ME.

Q. AND IS THAT – AFTER THAT IS WHEN YOU FILED YOUR EEOC CHARGE?

A. YES, SIR. WELL, ACTUALLY, I HAD ANOTHER MEETING WITH MR. JONES SOME TIME LATER, AND HE SAID THEN THAT THEY WOULD GET RID OF ME. AND THAT'S WHEN I WENT TO THE PAY PHONE AND CALLED EEOC.

Q. WHAT HAPPENED WITH THE EEOC?

A. I BEGGED THEM TO GET A CHARGE IN THERE BEFORE THE NEXT WEEK, BECAUSE I KNEW THAT WHEN – BY THE NEXT WEEK, THAT I'D PROBABLY BE TERMINATED.

Q. AND THEN – SO YOU FILED AN EEOC CHARGE; RIGHT?

A. YES, SIR.

Q. THAT'S EXHIBIT 3?

A. YES, SIR.

Q. AND THEN AFTER YOU FILED THE EEOC CHARGE, HOW WAS THAT RESOLVED?

A. I RECEIVED THE RIGHT TO SUE, AND THEN WE – THE COMPANY AND I REACHED AN

AGREEMENT, AND I GOT MY AREA MANAGER'S JOB BACK AND MOVED AWAY FROM THOSE TWO.

Q. SO YOU WERE PUT – YOU HAD BEEN TAKEN OUT OF THE MANAGEMENT JOB AND YOU GOT PUT BACK IN THE AREA MANAGER JOB IN 1982 OR '83?

A. YES, SIR.

* * * * *

[*40]

Q. NOW, FROM 1990 TO 1998, MOVING ON UP TO – CLOSER TO THE PRESENT, AND UP TO THE PRESENT WHEN YOU LEFT – DID YOU WORK WITH, OR WERE YOU SUPERVISED BY MR. MAUDSLEY OR MR. JONES?

A. YES. YES, SIR.

Q. WHO AMONG – WHO OF THOSE TWO SUPERVISED YOU FIRST?

A. I HAD – WELL, ACTUALLY, I WASN'T SUPERVISED BY MAUDSLEY. HE WAS MY AUDITOR.

Q. WHAT IS AN AUDITOR?

A. AN AUDITOR IS ONE WHO COMES THROUGH THE DEPARTMENT AND HE CHECKS CERTAIN ASPECTS OF THE DEPARTMENT, WHETHER IT BE SAFETY, HOUSEKEEPING – THERE'S

ABOUT EIGHT DIFFERENT THINGS THAT HE CHECKS – AND HE EVALUATES. HE HAS FORMS HE FILLS OUT. AND THEN ALSO, THE AREA MANAGERS COMPLETE CERTAIN |*41| FORMS, DOCUMENTS. AND MY – THE TIRE BUILDERS, THE WORKERS, FILLED OUT FORMS; AND WE, IN TURN, TURNED THOSE IN, AND HE KEEPS CHECK ON THOSE, TOO.

Q. MR. MAUDSLEY WOULD KEEP RECORDS OF YOUR PERFORMANCE –

A. THAT'S CORRECT.

Q. – THROUGH THESE AUDITS? HOW DID HE EVALUATE YOU?

A. VERY POORLY. IN FACT, HE COME THROUGH THE DEPARTMENT AND WRITE PEOPLE UP FOR NOT – FOR EXAMPLE, NOT HAVING SAFETY EQUIPMENT ON. AND YOU COULD BE – I COULD BE STANDING THERE LOOKING AT THEM AND THEY'D HAVE IT ON. BUT YET HE WOULD FILL THE PAPERWORK OUT THAT THEY DID NOT HAVE IT ON. HE'D ALSO SAY I HADN'T TURNED IN FORMS, AND I HAD.

Q. SO, SAFETY EQUIPMENT, SUCH AS – SAY, FOR EXAMPLE, GOGGLES?

A. RIGHT.

Q. GIVE ME AN EXAMPLE OF THAT SITUATION.

A. I HAD ONE TIRE BUILDER THAT HE HAD HIS COMPLETE PPE EQUIPMENT ON: EAR PLUGS,

GOGGLES, SAFETY SHOES – AND MAUDSLEY DISCUSSED GOLF WITH HIM. BUT YET, WHEN THE PAPERWORK CAME BACK, MY BUILDER GRAY GOT WROTE UP FOR NOT HAVING PPE EQUIPMENT ON.

Q. DID HE HAVE IT ON?

A. YES, HE HAD IT ON. AND HE HAD HAD IT ON THAT NIGHT.

Q. DID YOU – WHEN YOU WERE GETTING THESE – DID YOU THINK THESE SCORES THAT MR. MAUDSLEY WAS GIVING YOU WERE CORRECT? **[*42]**

A. NO.

Q. WERE THEY –

A. – I KNEW THEY WASN'T.

Q. DID YOU CONFRONT HIM ABOUT THESE ERRONEOUS SCORES THAT HE WAS GIVING YOU?

A. YES, I DID. I WENT TO MR. MAUDSLEY FIRST –

MR. ST. CLAIR: YOUR HONOR, AGAIN, I OBJECT TO THIS ON THE ISSUE OF TIMELINESS. IT'S NOT THE ISSUES OF THIS CASE.

MR. GOLDFARB: THIS –

THE COURT: RESPONSE?

MR. GOLDFARB: HE WAS HER AUDITOR IN AS LATE AS 1997 AND '98 – '97 –

THE WITNESS: – '97

MR. GOLDFARB: – HE WAS HER AUDITOR.

THE COURT: OBJECTION IS OVERRULED.

Q. GO AHEAD.

A. I WENT TO MIKE AND ASKED HIM WHY DID HE CONTINUE TO DOWNGRADE MY DEPARTMENT AND DOWNGRADE MY REPORTS WHEN HE KNEW THAT THEY WAS THERE AND IT WAS – IT'S GOOD AND BETTER THAN MOST. AND HE SAID, WELL, HELL, IT'S A LOT EASIER TO DOWNGRADE YOU. HE SAID, YOU'RE JUST A LITTLE FEMALE AND THESE BIG OLD GUYS, I MEAN, THEY'RE GOING TO BEAT UP ON ME AND PUSH ME AROUND AND CUSS ME. AND SAID, I KNOW YOU'RE NOT GOING TO [*43] CUSS BACK. HE SAID, HELL, IT'S A LOT EASIER TO WRITE YOU UP.

Q. DID MR. MAUDSLEY DO ANYTHING ELSE TO YOU SIMILAR TO THAT?

A. YES, SIR. HE CONTINUED TO ASK ME OUT, GO OUT WITH HIM. AND I FINALLY TOLD HIM NO. AND THEN FROM THAT STANDPOINT, MY EVALUATIONS, THE AUDITS GOT WORSE.

* * * * *

[*57]

Q. WHEN YOU WERE IN THE RLT JOB, WHAT WAS THE LAST DOCUMENT THAT – THAT'S THE JOB THAT MR. PAYNE GOT – WHAT WAS THE LAST DOCUMENT THAT YOU RECEIVED FROM GOODYEAR RELATED TO YOUR JOB PERFORMANCE?

A. THAT IT WAS OUTSTANDING. [*58]

Q. WAS IT –

A. – GREAT JOB.

Q. OKAY. WHAT WAS THAT DOCUMENT?

A. IT WAS A NOTE FROM KIM WHITEMAN.

Q. DID YOU RECEIVE ANY PERFORMANCE AWARDS WHILE YOU WERE IN THE RLT?

A. YES, I DID.

Q. WHAT TYPE OF PERFORMANCE AWARDS?

A. THAT WAS 1995 WHEN MIKE TUCKER TOLD ME I'D DONE AN OUTSTANDING JOB, I GOT A TOP PERFORMANCE AWARD.

Q. WAS THAT THE LAST DOCUMENT YOU RECEIVED WHEN YOU WERE IN RLT?

A. THAT'S CORRECT.

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[*74]

Q. WHEN YOU WENT OVER TO THE TECHNOLOGY ENGINEER JOB, TELL ME, DID YOU RECEIVE ANY TRAINING, MATERIALS –

A. NO, SIR.

Q. – OR ANYTHING –

A. NO, SIR. THEY SAID THERE WAS NOT ANY. I ASKED FOR A JOB DESCRIPTION AND A PROCEDURE BOOK, AND THEY DIDN'T HAVE THEM.

Q. NOW, AS AN AREA MANAGER ALL YOUR CAREER, YOU'VE BEEN SUPERVISING PEOPLE; RIGHT?

A. RIGHT.

Q. YOU GO OVER TO THE TECH JOB, AND TELL US WHAT – WHAT WERE YOUR DUTIES, WHAT DID YOU DO WHEN YOU GOT OVER TO THE TECHNICAL ENGINEER JOB, WHAT DID THEY HAVE YOU DOING?

A. ONE OF THE MAIN RESPONSIBILITIES, WE WERE RUNNING HUMMER TIRES IN THE PLANT. AND IT WAS OUR JOB TO CHECK, HAND CHECK, AT LEAST A HUNDRED AND TWENTY-FIVE PER SHIFT, WHICH MEANT THAT IF THE OFF-GOING SHIFT DIDN'T DO THEIRS, THAT MEANT I CAUGHT 250 OF

THEM. [*75] AND THEY WEIGH 80 POUNDS A PIECE. THEY GO ON HUMMERS. THEY'RE EXTREMELY HEAVY TIRES. THERE WERE 16 PER TRUCK. I HAD TO GET THEM OFF THE TRUCK. I HAD TO EXAMINE THEM INSIDE, BOTH SIDES, TREAD, ALL THE – THE ENTIRE TIRE, BECAUSE THIS COULD NOT – WE COULD NOT HAVE ANY DEFECTS GET OUT OF THE PLANT. AND THEN I HAD TO EXAMINE APPROXIMATELY 120 OF THE REGULAR TIRES PER SHIFT, AND I HAD TO WORK IN THE PITS ALSO. AND THE PITS IS WHERE THEY CURED THE TIRES.

Q. HOW DID YOU MOVE THESE 80-POUND TIRES AROUND?

A. JUST ROCKING AND PUSHING UNTIL I COULD GET THEM OFF THE TRUCK. AND JUST ROCKING AND PULLING AND PUSHING, AND FINALLY GET THEM OFF THE TRUCK.

Q. COULD YOU PICK THEM UP?

A. I COULDN'T PICK THEM UP. 80 POUNDS EACH, I'D JUST KEEP ROLLING THEM UNTIL I COULD CHECK EACH SECTION AND EACH SPOT ON THE TIRE – INSIDE AND OUT.

* * * * *

Cross-Examination of Lilly Ledbetter

[*90]

Q. YES, MA'AM. YOU DON'T – YOU DON'T CLAIM TO BE AS QUALIFIED AS DICK JONES TO BE AN AREA MANAGER IN THE TIRE ASSEMBLY ROOM, DO YOU?

A. HOW DO YOU DEFINE "AS QUALIFIED"? BECAUSE I HAD 20 YEARS EXPERIENCE AS AN AREA MANAGER; I HAD BEEN A MANAGER FOR 15 YEARS PRIOR TO GOING TO GOODYEAR, AND MANAGEMENT IS MANAGEMENT.

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Redirect Examination of Lilly Ledbetter

[*151]

Q. MR. JONES IS THE PERSON WHEN YOU – WHO YOU COMPLAINED ABOUT THE SEXUAL HARASSMENT; RIGHT?

A. THAT'S RIGHT.

Q. AND LOTHER YARBROUGH IS THE PERSON WHO WAS PUTTING HIS HANDS ON YOU THAT YOU JUST TESTIFIED ABOUT IS THE PERSON YOU TOLD MR. JONES ABOUT; RIGHT?

A. THAT'S RIGHT.

Q. AND WHAT DID HE SAY TO YOU?

A. HE SAID, WELL, LOTHER HAS 30 YEARS SERVICE, HE'S A GOOD EMPLOYEE AND WE'LL DEFINITELY KEEP HIM. YOU'RE A TROUBLEMAKER AND WE DON'T NEED YOU.

* * * * *

Direct Examination of Cathy Robertson

[*206]

Q. HAVE YOU EVER WORKED AT THE GOODYEAR PLANT BEFORE?

A. YES, SIR, I HAVE.

Q. TELL ME ABOUT YOUR EMPLOYMENT HISTORY, PLEASE, AT THE GOODYEAR PLANT.

A. I HIRED IN IN APRIL OF 1976. I WORKED AS A UNION WORKER IN THE PLANT FOR 17 YEARS. I BUILT TUBES, CURED, BUILT TIRES FOR EIGHT YEARS.

I WAS A UNION REPRESENTATIVE FOR ONE YEAR, AND I – IN SUPERVISION FOR FIVE YEARS.

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[*208]

Q. YOU WERE SUPERVISED BY MEN OR WOMEN?

A. IT WAS JUST MEN.

Q. AT SOME POINT – WELL, ALSO, YOU SAID YOU WERE A UNION – HOW LONG WERE YOU A UNION REP?

A. ONE YEAR.

Q. AT SOME POINT, DID YOU BECOME AN AREA MANAGER.

A. YES, SIR. IN 1993, I – THEY OPENED UP A TESTING, ASSESSMENT PROGRAM WHERE ANYBODY THAT WAS INTERESTED COULD TURN IN A RESUME. AND IF THEY WERE CHOSEN, THEY COULD GO THROUGH THIS CLASS AND TEST AND GO THROUGH ALL KIND OF QUESTIONS AND ANSWER SESSIONS; THEN THEY CHOSE FROM THAT POOL. I DON'T REMEMBER HOW MANY SUPERVISORS THEY PUT ON AT THAT TIME, BUT IT WAS PROBABLY TWO OR THREE.

Q. AND YOU WERE ONE OF THEM?

A. YES, SIR.

Q. YOU KNOW WHY YOU WERE PICKED?

A. WELL, I HAVE MY IDEAS ABOUT THAT. I FEEL LIKE IT WAS TIME THAT THEY HAD ANOTHER WOMAN SUPERVISOR –

MR. ST. CLAIR: YOUR HONOR, I OBJECT TO WHAT SHE FELT.

THE COURT: SUSTAINED.

BY MR. GOLDFARB:

Q. HOW LONG DID YOU WORK AS AN AREA MANAGER? **[*209]**

A. FIVE YEARS.

Q. WHERE DO YOU WORK – DID YOU LEAVE?

A. YES, SIR. I TOOK A BUYOUT WHEN THE PLANT DECIDED TO CLOSE DOWN. I FIGURED I'D BE THE FIRST ONE OUT THE DOOR –

Q. WHERE DO YOU WORK TODAY?

A. I WORK AT HONDA MANUFACTURING IN LINCOLN.

Q. ARE YOU A SUPERVISOR AT HONDA TODAY?

A. YES, SIR.

Q. WERE YOU EVALUATED WHILE YOU WERE AN AREA MANAGER?

A. THE ONLY EVALUATION I REMEMBER WAS THE YEAR BEFORE I LEFT. AND, LITERALLY,

IT STUNK. I REALLY DIDN'T AGREE WITH IT. I TOLD THE GENTLEMAN THAT WAS GIVING THE EVALUATION – TELLING ME THE RESULTS OF THE EVALUATION THAT I DIDN'T AGREE WITH IT. AND HE SAID, WELL, THAT'S JUST THE WAY IT IS. THIS IS THE WAY YOU'RE EVALUATED. AND THEY JUST LEFT IT AT THAT. I JUST TOLD THEM I DIDN'T AGREE WITH ANY OF IT.

Q. WERE YOU DOING ANYTHING DIFFERENT THAN THE MEN THAT WORKED ALONG BESIDE OF YOU –

A. NO, SIR, WE WORKED IN THE SAME JOB.

Q. WHY DO YOU THINK YOU WERE – WHY WERE YOU GRADED LOWER?

MR. ST. CLAIR: YOUR HONOR, OBJECT TO WHAT SHE THINKS OR FEELS.

Q. WHY – WHAT IS YOUR UNDERSTANDING THAT YOU WERE GRADED LOWER – YOUR OPINION? **[*210]**

THE COURT: OVERRULED. I'LL ALLOW HER TO TESTIFY TO HER UNDERSTANDING.

BY MR. GOLDFARB:

Q. WHAT IS YOUR UNDERSTANDING?

A. MY UNDERSTANDING WAS THAT I JUST – THE WAY THEY PUT IT, I WAS NOT DOING THE JOB 100 PERCENT THAT THEY – WHAT

THEY EXPECTED OF ME. AND I WAS DOING MY JOB EXACTLY LIKE EVERYBODY ELSE WAS. I WAS DOING WHAT THEY TOLD ME TO DO. AND ANYTHING THEY SAID WHAT THEY WERE EXPECTING OF ME, THAT'S WHAT I DONE.

Q. AND YOU WERE WORKING THE SAME AS THE MEN?

A. YES, SIR.

Q. WHAT – WHAT WAS YOUR – DID YOU REACH AN UNDERSTANDING AS TO WHY YOU WERE PAID – WHY YOUR EVALUATION WAS LOWER?

A. JUST SEEMED – WELL, THE WOMEN WERE, FOR SOME REASON, RATED LOWER THAN THE MEN. THEY DIDN'T THINK THEY COULD DO THE JOB THAT THE MEN COULD DO.

Q. DID YOU LET THEM KNOW YOU THOUGHT THE EVALUATION WAS WRONG?

A. YES, SIR, I DID.

Q. AS A RESULT – WELL, TELL ME ABOUT YOUR RAISES AS A RESULT OF THE EVALUATION. HOW DID THAT GO?

A. THE RAISE THAT WAS GIVEN TO ME AT THAT EVALUATION, I WAS TOLD BY SAM CLARK THAT THAT RAISE – THAT HE HAD TO GET ME UP TO A CERTAIN LEVEL BECAUSE I WAS

WAY BELOW THE LEVEL THAT I [*211] WAS SUPPOSED TO BE AT, PAY WISE.

Q. SAM CLARK IS UPPER MANAGEMENT?

A. HE WAS LIKE A MANAGER OVER THE AREA MANAGERS. YES, SIR.

Q. DO YOU KNOW HOW MUCH YOU WERE PAID WHEN YOU STARTED OFF AS AN AREA MANAGER?

A. NO, SIR, I DON'T KNOW HOW MUCH I MADE WHEN I STARTED OFF. I KNOW WHAT I COME OUT MAKING.

Q. ALL RIGHT. IF I COULD GET EXHIBIT –

MR. GOLDFARB: I WANT TO OFFER EXHIBIT 98, WHICH IS HER PAY RECORDS.

THE COURT: WITHOUT OBJECTION, IT'S RECEIVED IN EVIDENCE.

BY MR. GOLDFARB:

Q. THIS IS EXHIBIT 98.

THE COURT: IT MAY BE PUBLISHED TO THE JURY.

BY MR. GOLDFARB:

Q. MA'AM, I DON'T KNOW IF YOU'VE EVER SEEN THAT BEFORE, THAT'S SOMETHING THE COMPANY DOES, IT SHOWS YOUR PAY

RECORDS. HAVE YOU SEEN ANYTHING LIKE THAT?

A. NO, SIR.

Q. DID YOU KNOW WHAT YOUR PAY WAS – I UNDERSTAND YOU WERE TOLD YOU WERE PAID LESS – BUT DID YOU KNOW WHAT YOUR PAY WAS IN COMPARISON TO THE MEN YOU WORKED WITH?

A. NO, SIR. I DIDN'T KNOW THERE WAS ANY LIMIT THEY HAD TO BE AT. I WAS NOT TOLD THERE WAS A LEVEL THAT WAS A MINIMUM **[*212]** LEVEL OR A MAXIMUM LEVEL. I WAS JUST TOLD, THIS IS WHAT YOU WOULD BE PAID. THERE WOULD BE NO DEDUCTION, THIS IS IT.

Q. THESE ARE SOME EXHIBITS THAT THE DEFENDANT ENTERED. AND IF I COULD SHOW YOU –

MR. GOLDFARB: MAY I APPROACH THE WITNESS, YOUR HONOR?

THE COURT: YES.

BY MR. GOLDFARB:

Q. EXHIBIT 61 WAS MR. AMBERSON'S RECORDS, AND THE COMMON DATE IS 2/1/95. YOU SEE THAT ON THERE?

A. YES.

Q. AND YOU'RE AT 2728 A MONTH; RIGHT?

A. YES, SIR.

Q. MR. AMBERSON, DO YOU SEE HOW MUCH HE IS AT A MONTH?

A. 4425.

Q. THAT'S ON DEFENDANT'S EXHIBIT 61. ANOTHER AREA MANAGER THEY'VE GIVEN US THAT WE HAVE HERE IS MR. BARNES. ON 2/1/95, YOU WERE AT 27, HE WAS AT HOW MUCH?

A. 4186.

Q. AND MR. TODD, WHAT WAS HE AT WHEN YOU WERE 2728?

A. 4662.

Q. MR. THOMPSON, 64, WHAT WAS HE AT ON THAT DATE?

A. 4320.

Q. AND MR. MYERS? **[*213]**

A. 3960.

Q. AND YOU WERE AT 27?

A. YES, SIR.

Q. DID YOU KNOW THAT THEY WERE PAID THAT MUCH MORE THAN YOU?

A. YOU ALWAYS HEAR RUMORS THAT – AND I'VE HEARD IT OUT OF SEVERAL PEOPLE'S MOUTHS THAT THEY MADE QUITE A BIT MORE THAN I DID.

Q. AND YOU COULD GET OVERTIME AS AN AREA MANAGER AT THAT COMPANY; RIGHT?

A. YES, SIR.

Q. THAT'S – YOU UNDERSTOOD THAT THEY ALSO GOT OVERTIME; RIGHT?

A. YES, SIR. BUT THAT WOULDN'T BE REFLECTED ON YOUR –

Q. BUT THAT'S NOT OVERTIME?

A. – RIGHT.

Q. DID YOU COME TO AN UNDERSTANDING AS TO WHY YOU WERE BEING PAID LESS THAN THE MEN THAT WERE HOLDING THE SAME JOB YOU WERE?

A. NO, SIR, I WAS NEVER GIVEN THE REASON FOR THAT. I – I ALWAYS FELT BECAUSE I WAS A FEMALE AND I WAS PUT IN –

MR. ST. CLAIR: YOUR HONOR, I OBJECT TO FEELINGS.

BY MR. GOLDFARB:

Q. WHAT WAS YOUR UNDERSTANDING?

THE COURT: SUSTAINED.

Q. DID YOU COME UP WITH ANY OTHER REASON AS TO THE REASON [*214] YOU WERE PAID LESS AS AN AREA MANAGER THAN THE MEN?

A. JUST BEING A FEMALE –

Q. ALL RIGHT. AND YOUR HIRE DATE –

A. – IN A MAN'S WORLD.

Q. – WAS 1976; RIGHT?

A. YES, SIR.

Q. YOU WERE – DO YOU KNOW WHETHER YOU WERE HIRED BEFORE OR AFTER DONALD MYERS?

A. NO, SIR, I DON'T KNOW WHAT DATE HE WAS HIRED ON.

Q. LOOK AT EXHIBIT 63, SEE WHAT HIS CONTINUOUS SERVICE DATE IS?

A. 11/16/77.

Q. SO YOU WERE HIRED BEFORE HIM?

A. YES, SIR. I WAS HIRED IN '76.

Q. DID YOU EVER COMPLAIN THAT YOU WERE BEING PAID LESS BECAUSE OF YOUR GENDER?

A. NO, SIR, I DID NOT COMPLAIN, BECAUSE I WAS A SINGLE MOTHER WITH A HANDICAPPED CHILD, AND I FELT THAT MY JOB – I KNEW THAT MY JOB WOULD BE IN JEOPARDY IF I STARTED COMPLAINING ABOUT THE PAY.AND YOU DID NOT HAVE ANY SECURITY BEING ON A SALARY JOB, BECAUSE THEY COULD LET YOU GO AT ANY TIME FOR ANY REASON.

Q. DID YOU WORK WITH MRS. LEDBETTER WHILE YOU WERE AN AREA MANAGER?

A. YES, SIR, I DID. **[*215]**

Q. DID YOU SAY YOU WERE AN AREA MANAGER IN STOCK PREP?

A. STOCK PREP. UH-HUH.

Q. AND SHE WAS AN AREA MANAGER WHERE, WHEN YOU WERE IN STOCK PREP?

A. SHE WAS IN THE TIRE ROOM. WE SUPPLIED THE COMPONENTS FOR HER TIRES.

Q. SO YOU GET THE COMPONENTS TOGETHER AND SHE BUILDS THE TIRES?

A. RIGHT.

Q. DID YOU HAVE ANY – SO YOU HAD TO WORK WITH HER; RIGHT?

A. YES, SIR.

Q. WERE YOU ON NIGHT SHIFT?

A. YES, SIR.

Q. AND SHE WAS ON NIGHT SHIFT?

A. YES, SIR.

Q. DID YOU HAVE ANY PROBLEMS WITH THE WAY SHE DID HER JOB?

A. NO, SIR, I DID NOT.

Q. DID IT CAUSE YOU ANY PROBLEMS ON YOUR END?

A. NO, SIR, IT DID NOT.

Q. FROM YOUR UNDERSTANDING, DID MRS. LEDBETTER KNOW WHAT SHE WAS DOING ON HER JOB?

A. YES, SHE DID.

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[*224]

Q. WHEN WERE YOU HIRED AT GOODYEAR?

A. 1971.

Q. WERE YOU EVER A SUPERVISOR AT GOODYEAR?

A. YES, I WAS.

Q. WHEN WERE YOU FIRST A SUPERVISOR.

A. IN 1971, I WENT ON THE PLANT SQUADRON TRAINING PROGRAM, AND I WAS SUPERVISOR UNTIL – FOR EIGHT YEARS.

Q. AND –

A. – 1973, EXCUSE ME.

Q. WHY DID YOU STOP BEING A SUPERVISOR AFTER BEING A SUPERVISOR FOR EIGHT YEARS AT THAT TIME PERIOD?

A. I HAD A SMALL CHILD AT HOME, I WAS A SINGLE PARENT. I WAS WORKING SECOND AND THIRD SHIFT, SIX DAYS A WEEK. THE LADY THAT HAD BEEN KEEPING MY CHILD DIED OF CANCER, AND I HAD NO ONE TO TAKE CARE OF HER.

Q. AT THAT PERIOD OF TIME, IT WAS CALLED SUPERVISOR. DID THAT JOB TITLE LATER GET ANOTHER NAME?

A. AREA MANAGER IS WHAT IT'S CALLED TODAY.

Q. DID YOU FILE AN EEOC CHARGE AGAINST THE COMPANY?

A. YES, SIR, I DID.

MR. GOLDFARB: WE OFFER EXHIBIT 90. [*225]

BY MR. GOLDFARB:

Q. WELL, FIRST, IS THAT THE EEOC CHARGE YOU FILED?

A. YES, SIR, IT IS.

MR. GOLDFARB: WE OFFER EXHIBIT 90.

MR. ST. CLAIR: YOUR HONOR, WE JUST RENEW THE OBJECTION OF THE MOTION IN LIMINE.

THE COURT: ALL RIGHT. IT'S RECEIVED.

BY MR. GOLDFARB:

Q. IN THAT CHARGE YOU STATE THAT YOU WERE DISCRIMINATED AGAINST IN PAY, AMONG OTHER THINGS, BUT YOU SAY IN PAY. DO YOU BELIEVE THAT?

A. YES, SIR, I DO.

Q. HAVE YOU BEEN DISCRIMINATED AGAINST AS A SUPERVISOR, OR AS AN AREA - WORKING THE JOB AS AN AREA MANAGER IN PAY AT GOODYEAR?

A. IN THE EARLY NINETIES, I WAS APPROACHED BY HAROLD SMITH, THE THEN PLANT MANAGER, TO GO BACK ON SUPERVISION. HE CALLED ME INTO HIS OFFICE, TOLD ME HOW MUCH I WOULD BE STARTING AT, WHICH WAS THIRTY-TWO HUNDRED DOLLARS A MONTH, WHICH HE SAID WAS THE BASE SALARY FOR AN AREA MANAGER; AND ASKED ME WOULD I CONSIDER GOING BACK ON SUPERVISION.

AND I DID ACCEPT THE JOB, I DID GO IN THE SUPERVISION JOB. I WORKED IT FOR THREE AND A HALF MONTHS. AT THE END OF THAT TIME, I NEVER GOT ANY MONEY.

I APPROACHED HIM – **[*226]**

THE COURT: WHAT DO YOU MEAN YOU NEVER GOT ANY MONEY?

THE WITNESS: I NEVER GOT ANY DIFFERENCE IN PAY. AT THE TIME, I WAS A SECRETARY AND I WAS MAKING APPROXIMATELY TWENTY-TWO HUNDRED DOLLARS A MONTH. I WENT ON SUPERVISION JOB, EVEN THOUGH I HAD EIGHT YEARS EXPERIENCE IN THE PAST. HE TOLD ME HE WOULD START ME AT THIRTY-TWO HUNDRED AND THEN HE

WOULD GIVE ME RAISES TO GET ME UP TO WHAT THE MEN WERE MAKING.

HOWEVER, I WORKED THE JOB THREE AND A HALF MONTHS, I NEVER RECEIVED A DIME. I WORKED THAT JOB AS AN AREA MANAGER, I WAS ON SECOND SHIFT – EXCUSE ME, I WAS ON THIRD SHIFT, AND HE NEVER PAID ME.

BY MR. GOLDFARB:

Q. WHERE WERE YOU WORKING AS AN AREA MANAGER AT A SECRETARY'S PAY, WHAT PARTICULAR AREA?

A. I HAD – IT WAS CALLED THE – THERE WAS – IT WAS AN ARF LINE. IN ADDITION I HAD R1, R2, R3H TIRE MACHINES; I HAD TRUCKERS, I HAD INSPECTION. I HAD A TOTAL OF 52 EMPLOYEES THAT I WAS RESPONSIBLE FOR.

Q. WERE THEY MAKING MORE THAN YOU>

A. OH, MUCH MORE.

Q. THE PEOPLE THAT YOU WERE SUPERVISING?

A. EXACTLY. I WAS MAKING SECRETARIAL PAY.

Q. IS THAT PARTICULAR JOB IN THE ARF ROOM ONE OF THE HARDEST [*227] JOBS AS AN AREA MANAGER?

A. AT THAT TIME IT WAS, I WAS TOLD. THE HARDEST JOB.

Q. WHY DO YOU THINK THEY WOULD NOT PAY YOU THE RATE THAT THE PLANT MANAGER TOLD YOU THAT WE WOULD PAY YOU TO GET YOU UP TO THE THIRTY - -

A. I THINK IT WAS BECAUSE I WAS A FEMALE.

Q. YOU WERE MAKING APPROXIMATELY – HE HAD TOLD YOU THIRTY-TWO HUNDRED?

A. YEAH. I WAS GOING TO BE GETTING IN THE NEIGHBORHOOD OF A THOUSAND DOLLAR A MONTH RAISE.

Q. SO YOU WERE MAKING ABOUT 2,000 OR TWENTY-TWO HUNDRED?

A. BETWEEN 2,000 AND TWENTY-TWO HUNDRED. I WAS GOING TO START AT THIRTY-TWO HUNDRED, WITH THE UNDERSTANDING THE FACT THAT I HAD EIGHT YEARS EXPERIENCE THAT HE WOULD PROGRESS ME UP AND GET ME TO WHAT THE MEN WERE MAKING.

Q. WHAT IS YOUR – HOW DID IT COME UP – WHAT'S YOUR UNDERSTANDING OF WHAT THE THIRTY-TWO HUNDRED NUMBER REPRESENTED?

A. HE TOLD ME THAT WAS THE BASE LINE FOR AN AREA MANAGER.

Q. DID YOU EVER RECEIVE THE BASE, EVEN THE BASE PAY, AS AN AREA MANAGER?

A. NO. I STAYED DOWN THERE, WHICH WAS THREE AND A HALF MONTHS AT THAT TIME WHEN I WENT BACK AT TWO MONTHS AND ASKED ABOUT THE MONEY. "WE'RE WORKING ON IT."

I WENT BACK AT THREE MONTHS AND ASKED ABOUT THE MONEY. [*228] "WE'RE WORKING ON IT." AT THREE AND A HALF MONTHS, HE FINALLY SAYS, "WE CAN'T GIVE YOU THE MONEY."

Q. AND WHAT HAPPENED?

A. I TOLD HIM I WANTED TO GO BACK TO THE OFFICE. I WAS NOT GOING TO WORK A SUPERVISIONAL JOB FOR SECRETARIAL PAY.

HE TOLD ME HE COULD GIVE ME A 20 PERCENT RAISE. 20 PERCENT, BEING – THAT WOULD HAVE GOT ME UP TO THE NEIGHBORHOOD OF TWENTY-SIX HUNDRED DOLLARS.

Q. STILL BELOW THE BASE?

A. STILL MUCH BELOW THE BASE, FROM WHAT HE TOLD ME THE BASE WAS.

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[*257]

Q. – BUT LET ME ASK A QUESTION. I KNOW IT WILL SEEM OBVIOUS, BUT JUST TO ESTABLISH IT. DID YOU HAVE ANY ROLE OR SAY-SO IN WHAT THE SALARIES OF THE EMPLOYEES WERE WHEN YOU CAME INTO THE AREA?

A. NO.

Q. JUST WHATEVER THEY WERE, THEY WERE?

A. YEAH. WHATEVER THEY WERE, THEY WERE. WHAT I HAD SAY-SO IN IS HOW MUCH RAISE THEY GOT FOR THE YEAR OF 19- – FOR '98, I HAD A SAY IN WHAT THE RAISE WAS, BASED ON THEIR '97 PERFORMANCE.

Q. NOW, IN DETERMINING THE RAISE FOR 1998 UNDER THE SYSTEM IN PLACE AT THAT TIME, WERE YOU SUPPOSED TO GIVE CONSIDERATION TO SOMEBODY WHO MAYBE HAD A LOWER SALARY [*258] BECAUSE OF SOMETHING IN THE PAST?

A. NO. IT WOULD HAVE STRICTLY BEEN FOR THE YEAR 1997. NOW, THERE ARE REQUIREMENTS WHERE IF THEY'RE BELOW THE MINIMUM PAY RANGE FOR THEIR JOB, YOU HAVE TO DO SOMETHING. IN THE CASE FOR THIS YEAR, THERE WAS NO ONE BELOW THE MINIMUM PAY RANGE, SO THAT DIDN'T

ENTER INTO THE MERIT PLAN FOR THAT YEAR.

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Cross-Examination of Kelly Owen

[*268]

Q. UNDERLYING THE EVALUATION, YOU'VE GOT YOUR AUDITS AND YOU'VE GOT THE COMPUTER SYSTEM THAT SPITS OUT WHAT YOU NEED IT TO SPIT OUT, AND YOU'VE GOT SOME CHARTS SHOWING THE ACTUAL PRODUCTION YOU'VE TESTIFIED TO; RIGHT?

A. UH-HUH.

Q. CORRECT?

A. THAT'S CORRECT.

Q. AND WHEN YOU GAVE HER THIS EVALUATION, THIS WAS IN FEBRUARY OF 1998; CORRECT?

A. THAT'S CORRECT.

Q. WHERE, SIR, ARE THE UNDERLYING DOCUMENTS THAT CAN SHOW US AND THE JURY, AND CONCLUDE THIS, THAT SHOW HER PRODUCTION IS WORSE THAN EVERYBODY ELSE'S PRODUCTION? WHERE ARE THOSE – WHERE ARE THE AUDITS?

A. I – SIR, I COULDN'T TELL YOU WHERE THOSE AUDITS ARE. WHAT I CAN TELL YOU IS THAT AT THE TIME WE DID THOSE, THAT ME AND LILLY AND THE REST OF THE TEAM MEMBERS LOOKED AT THOSE DOCUMENTS AND USED THOSE TO JUSTIFY THE COMMENTS THAT I PUT ON THIS.

Q. BUT MRS. LEDBETTER DIDN'T FILL OUT THAT EVALUATION, DID SHE?

A. NO.

Q. GOODYEAR FILLED OUT THAT EVALUATION, DIDN'T THEY?

A. GOODYEAR DIDN'T FILL IT OUT, I DID. **[*269]**

Q. YOU DID? YOU WERE A GOODYEAR MANAGER?

A. THAT'S CORRECT.

Q. AND WHAT YOU USED WAS THE DOCUMENTS THAT YOU'VE GONE THROUGH AND TOLD US ABOUT; THE AUDITS, THE – THAT SHOWED WITHOUT QUESTION, HERE IS THE ACTUAL PRODUCTION NUMBERS – AND WHAT MR. ST. CLAIR SAYS IS YOU CAN'T MESS WITH THAT, THAT'S THE REAL THING; AND WE COULD LOOK AT THAT AND SEE WHAT HER PRODUCTION NUMBERS ARE AND EVERYBODY ELSE'S PRODUCTION NUMBERS ARE, COULDN'T WE?

A. YEAH, BACK IN 1997. YES.

Q. BUT YOU DESTROYED THOSE DOCUMENTS, DIDN'T YOU?

A. I DIDN'T DESTROY ANYTHING.

Q. THEY'RE DESTROYED, AREN'T THEY?

A. I DON'T KNOW.

Q. WELL, YOU'D HAVE THEM HERE TODAY IF THEY WEREN'T DESTROYED, WOULDN'T YOU? THEY'D SHOW FOR SURE –

A. I DON'T KNOW WHERE THE DOCUMENTS ARE, SIR.

Q. HAVE YOU LOOKED FOR THEM?

A. NO, I HAVEN'T LOOKED FOR THEM. I JUST FOUND OUT I WAS COMING A WEEK AGO.

Q. DO YOU KNOW WHY I DON'T HAVE THEM? BECAUSE I'VE ASKED FOR THEM.

A. OKAY.

Q. DO YOU KNOW WHY? DO YOU KNOW WHY WE DON'T HAVE THEM?

A. I DON'T KNOW. **[*270]**

Q. IS THERE – IS THERE A POLICY –

A. – I DON'T KNOW –

Q. – WELL, DO YOU KNOW THAT MRS. LEDBETTER WENT TO THE EEOC A MONTH AFTER THIS DATE THAT YOU'D SAT DOWN WITH HER, A MONTH OR SO AFTER, FILLED OUT A QUESTIONNAIRE; THREE MONTHS LATER, SHE FILES A CHARGE AND Y'ALL GET IT IN SEPTEMBER, AND THEN THOSE DOCUMENTS ARE GONE; DO YOU KNOW WHY?

A. NO, I DON'T KNOW WHY.

Q. I MEAN, WOULDN'T YOU THINK THAT'S THE BEST WAY TO SHOW OBJECTIVELY THAT HER PERFORMANCE IS NOT AS GOOD AS EVERYBODY ELSE'S, TO COME UP WITH THE ACTUAL "HERE'S THE PRODUCTION NUMBERS"?

A. I DIDN'T FEEL THERE WAS A NEED FOR THAT, BECAUSE WE REVIEWED THOSE AT THE TIME OF THE EVALUATION. AND WHAT YOU HAVE TO REMEMBER IS THAT THE TEAM MEMBER HAS AN OPPORTUNITY TO MAKE COMMENTS WHEN THEY DISAGREE WITH THEIR EVALUATION, AND THEY ALSO HAVE THE OPPORTUNITY TO – THEY GET IT TO SIGN IT.

Q. WOULDN'T YOU THINK MRS. LEDBETTER WAS – IF SHE'S IN A NEW JOB, GOT TRANSFERRED OUT OF HER JOB, SHE'S SCARED TO DEATH THAT SHE'S ABOUT TO LOSE HER JOB? HERE SHE GOES OFF TO A NEW JOB, YOU KNEW SHE WAS SCARED.

A. AT THE TIME I EVALUATED MRS. LEDBETTER, I DON'T THINK SHE WAS CONCERNED SHE WAS GOING TO LOSE HER JOB.

Q. ONE THING THAT YOU DID HAVE – YOU LOOKED BACK AT THE [*271] PRIOR YEAR – WAS THE NOTES THAT JERRY JONES MADE ABOUT MRS. LEDBETTER, DIDN'T YOU?

A. JERRY PROVIDED ME WITH SOME NOTES HE PASSED DOWN. THAT'S CORRECT.

Q. HOW MANY PAGES?

A. I DON'T RECALL HOW MANY PAGES THERE WERE OF NOTES. IT WAS – WE SAT DOWN FOR A DAY AND WENT THROUGH EVERY MANAGER'S STRENGTHS AND WEAKNESSES. AND THERE WERE SOME COMMENTS ON, YOU KNOW, WHERE HE FELT PEOPLE NEEDED TO WORK TO GET TO BE BETTER MANAGERS, AND KIND OF GOT ME UP TO SPEED ON THE PEOPLE RUNNING THE DEPARTMENT.

Q. AND THOSE NOTES ARE SOME OTHER UNDERLYING DOCUMENTS THAT WOULD SHOW WHAT WENT INTO THE EVALUATION THAT THEY'RE USING TO SAY HER PERFORMANCE IS BAD; RIGHT?

A. NO. I WOULDN'T HAVE USED JERRY'S DOCUMENTS THAT HE PROVIDED ME TO DO THIS EVALUATION.

Q. YOU WOULD IGNORE THE NOTES THAT HE HAD – HE'D BEEN WITH HER THE MAJORITY OF THAT YEAR AND THE YEAR BEFORE; RIGHT?

A. THE NOTES THAT JERRY GAVE ME WERE NOT PERFORMANCE NUMBERS. THEY WEREN'T NUMBERS THAT YOU COULD ACTUALLY DO AN EVALUATION ON.

THE PERFORMANCE NUMBERS WERE IN THE BUSINESS CENTER SCORECARDS THAT WERE KEPT THROUGHOUT THE BUSINESS. THE NOTES THAT JERRY SHARED WITH ME ON PASS DOWN WERE MORE PRIVATE NOTES ABOUT PEOPLE'S PERFORMANCE AND WHERE THEY STOOD AS FAR [*272] AS, YOU KNOW, DIFFERENT PARAMETERS, THE WAY THEY MANAGED THE BUSINESS.

Q. OKAY. THOSE WERE PERFORMANCE NOTES THAT JERRY USED – GAVE YOU TO TALK TO YOU ABOUT MRS. LEDBETTER. WHAT I WANT TO KNOW, SIR, IS WHERE ARE THOSE NOTES?

A. THOSE NOTES WERE NOT PERTINENT TO THIS EVALUATION; AND, THEREFORE, I WOULDN'T HAVE KEPT THOSE –

Q. – THEY'RE PERTINENT TO THIS LAWSUIT – I'M TRYING TO GET AN UNDERSTANDING OF WHAT ABOUT MRS. LEDBETTER'S PERFORMANCE IS SO BAD, YOU'VE THROWN – HAVE YOU THROWN AWAY THE AUDITS?

A. I HAVEN'T THROWN AWAY ANYTHING.

Q. SO THEY MIGHT BE OVER THERE AT THE PLANT RIGHT NOW?

A. I DON'T KNOW. I HAVEN'T BEEN IN THE PLANT SINCE – SINCE I LEFT THE BUSINESS CENTER.

Q. OKAY. DID YOU THROW AWAY JERRY'S NOTES?

A. JERRY'S NOTES, I WOULD NOT HAVE KEPT. NO.

Q. EVEN IF THERE WAS AN EEOC CHARGE THAT CAME SHORTLY AFTER?

A. I WASN'T AWARE OF ANY EEOC CHARGE.

Q. OKAY. BUT YOU WERE – AT THAT TIME, YOU WERE A MANAGER AT THE COMPANY; RIGHT?

A. YES, I WAS.

Q. YOU SAID YOU – WHERE – WHERE DO YOU LIVE RIGHT NOW?

A. AMERICANA, BRAZIL.

Q. YOU LIVE IN –

THE REPORTER: I'M SORRY? **[*273]**

THE WITNESS: AMERICANA, BRAZIL.

Q. OH, SO YOU CAME UP HERE FROM BRAZIL TO TESTIFY.

A. THAT'S CORRECT.

Q. HOW OLD ARE YOU?

A. I'M 38 YEARS OLD.

Q. YOU SAID THE PRODUCTION NUMBERS WERE POSTED. IS IT A BIG BOARD THAT THEY'RE POSTED ON?

A. IT WAS IN THE CONFERENCE ROOMS.

Q. ARE ALL THOSE THROWN AWAY?

A. I – I CAN'T ANSWER THOSE TYPES OF QUESTIONS, BECAUSE I HAVEN'T BEEN WORKING IN GADSDEN.

Q. WHO IS –

A. – CERTAINLY, I DIDN'T THROW THEM AWAY.

Q. WHO'S THE AUDITOR?

A. THE AUDITOR AT THE TIME THAT I WAS THERE WAS MIKE MAUDSLEY.

Q. MIKE MAUDSLEY, THE AUDITOR IN THE ARF ROOM; RIGHT?

A. THAT'S CORRECT.

Q. AND HE IS THE AUDITOR WHO DID THE EVALUATION THAT YOU USED – WHO DID HIS AUDITS AND THE SUMMARY SCORES OF THE AUDITS THAT YOU USED TO DO YOUR EVALUATIONS; RIGHT?

A. THAT'S NOT CORRECT.

Q. I THOUGHT YOU SAID YOU USED THE AUDITS TO DO YOUR EVALUATION?

A. I USED THE AUDITS TO DO A PORTION OF THE EVALUATION. **[*274]**

Q. WELL, DID YOU – AND YOU – ONLY SUPERVISED HER YOURSELF FOR A VERY SHORT PERIOD OF TIME?

A. THREE MONTHS, YEAH.

Q. AT THE BEGINNING OF YOUR TESTIMONY, YOU TESTIFIED ABOUT HOW THE AUDITS ARE USED TO DO THE EVALUATION, SO NOW YOU'RE ONLY SAYING YOU USED JUST A SMALL PORTION OR A BIG PORTION? HOW MUCH?

A. WOULD YOU LIKE ME TO CLARIFY THAT?

Q. I WANT TO KNOW HOW MUCH OF THE SCORECARDS THAT MR. MAUDSLEY DID THAT BECAME THE AUDITS – BECAUSE IT'S A MONTHLY SCORECARD AND IT SUMMARIZES THE YEARLY; RIGHT?

A. LET ME HELP YOU UNDERSTAND THAT. THERE WERE REALLY THREE PARTS, OKAY, TO THE PERFORMANCE REVIEW.

OKAY. THERE WAS THE PART THAT WAS THE NUMERICAL DATA. OKAY. THAT PART WAS TAKEN FROM COMPUTER REPORTS AND FROM INFORMATION THAT THE PRODUCTION SPECIALIST SUPPLIED –

Q. AND DOES THAT –

A. – WHICH WOULD HAVE BEEN FOR LILLY, WOULD HAVE BEEN VANCE HOLDERFIELD. OKAY –

Q. – DOES THAT EXIST TODAY?

A. I DON'T KNOW.

Q. WHO CREATED THAT?

A. WELL, THOSE WOULD HAVE BEEN COMPUTER-GENERATED REPORTS THAT VANCE HOLDERFIELD WOULD HAVE PUT INTO A SPREADSHEET FOR THE ARE MANAGERS AND MYSELF. **[*275]**

Q. AND YOU KEEP THEM, DON'T YOU?

A. YEAH, WE KEPT THEM.

Q. WHAT IF THERE'S A – YOU KNOW, THIS COMPANY IS NOT A COMPANY LIKE FIRESTONE – BUT WHAT IF THERE'S A PROBLEM LIKE FIRESTONE AND SOMETHING

HAPPENED WITH THE TIRES – YOU KEEP THOSE REPORTS, DON'T YOU? YOU'VE GOT TO –

A. THERE IS CERTAIN DATA THAT YOU KEEP FOR LONG PERIODS OF TIME. THERE'S CERTAIN DATA THAT YOU KEEP FOR SHORT PERIODS OF TIME.

Q. AND YOU DON'T KNOW WHICH –

A. AND I DON'T – YOU'D HAVE TO ASK SOMEONE ELSE.

Q. ALL RIGHT. AND THERE'S A WHOLE ANOTHER SECTION OF THE AUDIT THAT MR. MAUDSLEY – IS BASED ON WHAT MR. MAUDSLEY DOES; RIGHT?

A. THERE IS – THERE IS A PORTION OF THE DATA THAT I USED, YES, THAT MR. MAUDSLEY –

Q. CORRECT?

A. THAT'S CORRECT.

Q. IN FACT, IF YOU WOULD LOOK AT – I MEAN, I'VE SEEN A COUPLE OF SCORECARDS, AND THE SCORECARDS ARE BASICALLY THE SAME AS THE AREAS IN THE EVALUATION: WASTE, QUALITY, PRODUCTION – ALL THOSE ARE ON THE SCORECARDS, AREN'T THEY – HOUSEKEEPING?

A. UH-HUH.

Q. CORRECT? [*276]

A. OH, YES.

Q. RIGHT? THAT'S A WHOLE EVALUATION.

A. YEAH, IT'S ON IT.

Q. ALL BASED ON THE AUDIT?

A. NO, IT'S NOT ALL BASED ON THE AUDIT.

Q. ALL RIGHT. IS THERE A THIRD ONE, OR IS THAT JUST YOUR OWN OBSERVATION.

A. THAT WOULD BE CORRECT.

Q. ALL RIGHT. NOW, THIS SAYS –

A. AS THE MANAGER OF THE DEPARTMENT, I WOULD MAKE OBSERVATIONS LIKE, INSURES LIGHT DUTY LABOR IS USED EFFECTIVELY. IF YOU LOOK AT PERFORMANCE STANDARD NO. 2 ON THE FIRST PAGE, THAT WOULD BE ONE THAT I WOULD HAVE DISCUSSED WITH LILLY, AND SAID, YEAH, I THINK YOU UTILIZE YOUR LIGHT DUTY. THAT WOULD HAVE BEEN BASED ON MY OBSERVATION.

Q. AND YOU WOULD BASE THAT ON THE TIME PERIOD WHEN YOU – I GUESS WHEN YOU WOULD ACTUALLY SIGN THOSE TIMECARDS? AS HER SUPERVISOR, YOU WOULD SIGN HER TIMECARDS?

A. I GUESS – WHAT ARE YOU ASKING ME? COULD YOU REPEAT THE QUESTION –

Q. – YOU KNOW WHAT A TIMECARD – I'VE GOT SOME – WE'VE GOT A – LOOKED AT SOME DOCUMENTS AT SOME POINT IN TIME THAT SHOWED WHEN YOU ACTUALLY DID SUPERVISE HER, I GUESS, AND YOU SIGNED HER TIMECARDS?

A. YEAH. ALL THE TIMECARDS WERE HANDED IN AND SIGNED – * * * * *

[*280]

Q. OKAY.

A. – THAT'S A SEPARATE CONVERSATION.

Q. THE NEXT DOCUMENT THAT Y'ALL TALKED ABOUT IS THIS EXHIBIT 48, AND THIS IS THE RANKING WHICH PUTS MRS. LEDBETTER NEXT TO THE BOTTOM AND MR. NANCE IS UNDER HER; RIGHT?

A. THAT'S CORRECT.

Q. MR. NANCE MAKES A LOT MORE MONEY THAN SHE DOES, DOESN'T HE?

A. AT THAT TIME, YEAH, HE DID.

Q. I MEAN, IF YOU LOOK AT THIS THING, THERE IS – WHO ARE THE TWO LOWEST PAID PEOPLE ON THERE?

A. IN THE AREA MANAGER CLASSIFICATION?

Q. NO, ON THE WHOLE LIST. I WANT TO JUST TELL THEM EVERYTHING. WHO ARE THE TWO LOWEST PAID PEOPLE ON THIS LIST?

A. IT WOULD BE THE SECRETARY, RETHA BURNS –

Q. WHO JUST TESTIFIED EARLIER?

A. – AND IT WOULD BE LILLY LEDBETTER, WHO WAS AN AREA MANAGER AT THE TIME.

Q. ARE THERE ANY OTHER WOMEN ON THIS LIST?

A. NO.

Q. AND THE TWO LOWEST PAID PEOPLE ON THIS LIST ARE FEMALE; RIGHT?

A. YES. * * * * *

Cross-Examination of Jerry Jones

[*308]

Q. SO, SINCE 1973, YOU HAD BEEN IN MANAGEMENT AT GOODYEAR?

A. THAT'S CORRECT.

Q. AND DURING THAT PERIOD OF TIME, HOW MANY WOMEN AREA **[*309]** MANAGERS

EVER WORKED UNDER YOU, OTHER THAN MRS. LEDBETTER?

A. OKAY. IT WILL TAKE A MINUTE, I'LL TRY TO – FOR THE ENTIRE PERIOD?

Q. YEAH.

A. YOU WANT BY NAME, OR JUST BEST I CAN COME UP WITH?

Q. JUST BEST YOU CAN COME UP WITH, OTHER THAN MRS. LEDBETTER.

A. OKAY.

Q. WHO, AND FOR HOW LONG?

A. OKAY. MARY LEVINSON.

Q. ALL RIGHT. HOW LONG DID – MRS. MARY LEVINSON WAS NOT AN AREA MANAGER VERY LONG, THOUGH, WAS SHE?

A. MARY LEVINSON WAS AN AREA MANAGER IN THE ARF ROOM, WHICH IS THE SAME SECTION THAT –

Q. YEAH.

A. – MRS. LEDBETTER WAS HERE. SHE CAME, AND WHEN WE WENT TO FOUR SHIFT OPERATION, WORKED THE JOB IN THE TIRE ROOM HERE. WHEN WE HAD THE FIRST LAYOFF, SHE WAS INVOLVED; WENT ON TO DANVILLE, VIRGINIA AS AN AREA

MANAGER; THEN SHE WENT TO LAWTON, OKLAHOMA –

Q. ALL RIGHT. WELL, I'M TALKING ABOUT WHILE SHE WAS HERE AT THIS GOODYEAR PLANT?

A. OKAY.

Q. JUST THIS GOODYEAR PLANT?

A. OKAY. ANYWAY, SHE WAS – **[*310]**

Q. SO SHE WAS – SQ SHE WAS AN AREA MANAGER FOR ABOUT HOW LONG, A MATTER OF MONTHS?

A. I REALLY DON'T KNOW. OKAY?

Q. WHO WAS THE NEXT ONE?

A. NEXT ONE WOULD BE SUE DOUGLAS, WHO WAS A –

Q. OKAY. WHEN WAS THAT?

A. THAT WAS IN EIGHTY – EARLY '95 PERIOD.

Q. HOW LONG WAS SUE DOUGLAS AN AREA MANAGER?

A. FROM '85 UNTIL SHE HAD CANCER AND PASSED AWAY SOMETIME IN THE LATE EIGHTIES.

Q. OKAY. SO –

A. I DON'T REMEMBER WHEN THAT WAS.

Q. – FOR A FEW YEARS? DID YOU SUPERVISE HER THAT WHOLE TIME?

A. YES, I THINK I DID.

Q. OKAY. WHO ELSE?

A. OKAY –

Q. LET ME ASK YOU THIS QUESTION: HOW MANY TIMES DID YOU SUPERVISE MORE THAN ONE WOMAN WHO WAS AN AREA MANAGER AT THE SAME TIME?

A. IN MOST CASES, LIKE ON A SHIFT WHERE YOU'D BE MEETING WITH A CREW, THERE WAS PROBABLY NO MORE THAN ONE ON A CREW, MAYBE.

* * * * *

[*312]

Q. AND AS PART OF YOUR H.R. TRAINING, IF YOU SAW A DISCREPANCY OF A WOMAN WORKING WITH A BUNCH OF OTHER MEN, IN HER PAY, WOULDN'T THAT TURN ON A LIGHT IN YOUR HEAD?

A. IN LOOKING AT SALARIES, WHAT YOU LOOK AT IS – IS THE GROUP ABOVE THE MID – THE LOW POINT. IN OTHER WORDS, IF THERE'S A MINIMUM AMOUNT OF SALARY, YOU TRY TO

MAKE SURE NOBODY STAYS – GETS BELOW THAT.

BUT AS FAR AS WHERE SOMEBODY IS AT IN THE SALARY RANKING, THAT IS AN ACCUMULATION OF THEIR HISTORICAL MERITS; THEIR – THEIR HISTORY OVER THE YEARS; THAT THEIR TOTAL SALARY IS AN ACCUMULATION OF EACH YEAR.

THE FACT THAT – YOU WOULD LOOK, IF THERE'S SOMEBODY BELOW THE LOW POINT, AND SAY, HEY, I NEED TO DO SOMETHING TO KEEP THEM. BUT AS LONG AS THEY'RE IN THEIR RANGE, IT'S NOT SOMETHING YOU WOULD LOOK AT. YOU'D ALSO LOOK AT WHERE THEY WERE PERFORMING.

* * * * *

Direct Examination of Michael Tucker

[*338]

A. YOU'RE READING THAT EXACTLY RIGHT. WE WERE GIVEN AN ALLOCATION, A TOTAL ALLOCATION. AND DURING THIS PAY PERIOD OR DURING THIS POLICY PERIOD, WE WERE ABLE TO GIVE A NUMBER OF RAISES, MAINLY BECAUSE OF THE AMOUNT OF MONEY THAT I WAS BUDGETED.

Q. RIGHT. I NOTICE THAT DOWN AT THE BOTTOM IT SAYS "TOTAL ALLOCATION"

AND "TOTAL EXPENDITURES." WHAT DOES THAT MEAN?

A. THAT'S THE TOTAL AMOUNT OF MONEY THAT WE WERE GIVEN TO ALLOCATE – TO DIVVY OUT INTO RAISES.

Q. SO YOU HAD A SET BUDGET, AND THEN YOU HAD TO DECIDE HOW TO DISTRIBUTE IT –

A. THAT'S CORRECT. AND THE POLICY ALSO STATED A MAXIMUM TIME FRAME, EITHER 12 OR 18 MONTHS, BY WHICH YOU COULD ACTUALLY GIVE SOMEONE A MERIT INCREASE. AND IT ALSO OUTLINED A MAXIMUM AMOUNT, PERCENTAGE AMOUNT, THAT YOU COULD GIVE SOMEONE.

* * * * *

[*342]

A. * * * BUT DURING THIS PERIOD, I HAD $906 THAT I HAD TO SHARE – THAT I COULD SHARE WITH THESE INDIVIDUALS. AND YOU CAN SEE MR. MILLER AND MR. THOMPSON AT THAT TIME WERE NOT ELIGIBLE FOR A RAISE. AND SO I WAS ABLE TO GIVE EVERYONE, EXCEPT THOSE TWO IN MY AREA OF RESPONSIBILITY, A MERIT INCREASE. MAINLY, ONCE AGAIN, TO TRY TO MAKE CERTAIN THAT LILLY WAS NOT AT THE BOTTOM OF THE PAY RANGE, OR UNDER THE MINIMUM.

* * * * *

Q. LET ME NOW SHOW YOU WHAT WE'VE MARKED AS DEFENDANT'S EXHIBIT 6. IS THAT A DOCUMENT THAT YOU PREPARED?

A. (LOOKING AT EXHIBIT.) YES, SIR, IT IS.

Q. THESE OTHER DOCUMENTS, THE ONES FROM THE EARLIER YEARS; I THINK MRS. LEDBETTER SAID THAT SHE FOUND THEM – FOUND ONE OF THEM IN THE TRASH CAN OR SOMETHING, AND THEN KEPT THEM ALL OVER THESE YEARS. [*343] WOULD YOU – WOULD THESE BE DOCUMENTS YOU WOULD HAVE KEPT –

A. YES, THESE ARE DOCUMENTS THAT SHOULD BE ALWAYS – THEY'RE CONFIDENTIAL DOCUMENTS, DOCUMENTS THAT ALWAYS SHOULD BE LOCKED UP. * * * *

Q. NOW, THIS IS YOUR – WHAT IS DEFENDANT'S EXHIBIT 6?

A. THIS IS THE MERIT ALLOCATION FOR RADIAL TIRE ROOM BUSINESS CENTER IN GADSDEN.

* * * * *

[*354]

Q. AND YOU KNOW THAT – SURELY YOU ARE – YOU ARE FAMILIAR WITH THE POLICIES AND PROCEDURES CONCERNING THE TOP PERFORMANCE AWARD AND THE – AND THE INDIVIDUAL PERFORMANCE AWARD?

A. YES, SIR.

Q. AND YOU KNOW THAT THAT AWARD IS SUPPOSED TO BE GIVEN FOR TOP PERFORMANCE, DON'T YOU?

A. PER THAT POLICY, IT WAS STATED IT WAS FOR TOP PERFORMANCE. YES, SIR.

Q. IN FACT, IT SAYS – AND I'M LOOKING AT PLAINTIFF'S EXHIBIT 17, WHICH WAS PREVIOUSLY ADMITTED – IT SAYS THAT "IT IS CRITICAL THAT TPA'S ONLY BE GRANTED TO THOSE INDIVIDUALS WHO HAVE DEMONSTRATED, THROUGH VALUE, ADDED CONTRIBUTIONS THAT THEY ARE, IN FACT, THE TOP PERFORMERS IN THE COMPANY."

YOU KNEW IT SAID THAT, DIDN'T YOU?

A. THAT'S WHAT THE POLICY SAYS.

Q. FOR – AND ALSO SAYS "FOR THE TOP PERFORMANCE AWARD FOR ONLY THE HIGHEST LEVEL OF INDIVIDUAL PERFORMANCE AND CONTRIBUTION IN AN

ORGANIZATION"; THAT'S – YOU KNEW THAT WAS WHAT IT SAID?

A. YES, SIR.

Q. AND IF YOU LOOK AT PLAINTIFF'S EXHIBIT NUMBER 16, WHICH [*355] IS THE SALARY COMPENSATION PROGRAM, DID YOU KNOW THAT IT ALSO SAID FOR TOP PERFORMERS, "THOSE WHO CONSISTENTLY EXCEED ALL PERFORMANCE STANDARDS OF THEIR JOB RESPONSIBILITIES"? ON PAGE 10, YOU SEE THAT?

A. (LOOKING AT EXHIBIT.) YES, SIR.

Q. SO THE AWARD THAT YOU GAVE HER, BASED UPON THE COMPANY RULES AND REGULATIONS, WAS ONLY SUPPOSED TO BE GIVEN TO THOSE – IT WAS CRITICAL THAT IT ONLY BE GIVEN TO THOSE WHO WERE THE VERY BEST IN PERFORMANCE; CORRECT?

A. PER THE POLICY. YES, SIR.

Q. AND, IN FACT, WHEN YOU GAVE THE AWARD TO MRS. LEDBETTER, YOU TOLD HER, DIDN'T YOU, THAT THE REASON SHE WAS GETTING SUCH A BIG INCREASE, 7.85 PERCENT, WAS BECAUSE SHE WAS BEING AWARDED THE TOP PERFORMANCE AWARD AND THE INDIVIDUAL PERFORMANCE AWARDS, DIDN'T YOU?

A. SIR, I DON'T RECALL TELLING HER THAT. NO.

Q. WELL, WHAT DID YOU TELL HER? IF YOU DON'T REMEMBER TELLING HER THAT, WHAT DID YOU TELL HER WAS THE REASON WHY YOU WERE GIVING HER A 7.85 PERCENT RAISE –

A. ONCE AGAIN, WE GO BACK TO LILLY'S SALARY RANGE, AND I WAS DOING EVERYTHING THAT I COULD TO MOVE HER SALARY UP.

AND AT THAT TIME, THE ONLY – DURING THAT PERIOD, THE ONLY WAY THAT I COULD GIVE HER A 7.85 PERCENT MERIT INCREASE WAS TO GIVE HER THE TOP PERFORMANCE AWARD.

Q. BUT WHAT DID YOU TELL HER? THAT'S NOT WHAT YOU TOLD HER, **[*356]** IS IT?

A. SIR, IN 1994, I CAN'T SIT HERE AND TELL YOU EXACTLY WHAT I DID TELL HER. BUT –

Q. DO YOU REMEMBER WHEN YOUR DEPOSITION WAS TAKEN?

A. YES, SIR.

Q. LOOK WITH ME, IF YOU WOULD, AT PAGE 177.

A. (LOOKING AT DEPOSITION.)

Q. AND WE'RE GOING TO BEGIN AT LINE 177, AND MR. GOLDFARB ASKS YOU THIS QUESTION BEGINNING AT LINE 7:

"WHEN YOU GAVE MRS. LEDBETTER THE 8 PERCENT RAISE, IT WAS IN DECEMBER OF 1995, DID YOU TELL HER THE REASON SHE WAS GETTING AN 8 PERCENT RAISE?"

READ YOUR ANSWER, PLEASE.

A. SAYS: "I CAN'T RECALL EXACTLY WHAT I SAID TO LILLY. I DON'T THINK THAT – I DON'T THINK – I'M ALMOST SURE THAT I DIDN'T TELL HER THAT SHE WAS RECEIVING A MERIT INCREASE BECAUSE OF WHAT HER SALARY WAS."

Q. "YOU TOLD HER IT WAS BASED ON HER JOB PERFORMANCE?"

WHAT WAS YOUR ANSWER?

A. "BASED ON HER JOB PERFORMANCE."

* * * * *

[*358]

Q. OKAY. FOR 2 AND 3, WHEN YOU LOOK AT THEM, IT'S CLEAR AS A BELL THAT SHE IS WAY LOWER THAN ALL THOSE OTHER MEN ON THE LIST, ISN'T SHE?

A. LILLY'S RATE WAS LESS THAN THE OTHER PEOPLE DOWN THERE.

Q. IN FACT, THERE'S NOT A MAN ON THERE THAT IS EVEN CLOSE TO THE LOW RANGE OF 2967, IS THERE?

A. ON THIS DOCUMENT, NO, SIR.

Q. IN FACT, EXCEPT FOR MR. BICE, WHO MADE 3995 IN '94, EVERYBODY ELSE MAKES 4400 OR MORE – IS THAT A MONTH OR IS THAT BIWEEKLY?

A. THAT'S A MONTHLY SALARY.

Q. A MONTH?

A. MR. THOMPSON MAKES 4320. **[*359]**

Q. MRS. LEDBETTER MAKES 3288, DOESN'T SHE?

A. ACCORDING TO THIS DOCUMENT, YES, SIR.

THE COURT: AND YOU HAVE NO REASON TO DOUBT THE DOCUMENT?

THE WITNESS: SIR?

THE COURT: YOU HAVE NO REASON TO DOUBT THE DOCUMENT?

THE WITNESS: NO, SIR.

BY MR. QUINN:

Q. AND – AND IT BECAME OBVIOUS TO YOU HOW LOW HER SALARY WAS, DIDN'T IT?

A. PER THE MINIMUM RANGE, HER SALARY WAS LOW.

Q. AND DIDN'T IT ALSO BECOME OBVIOUS TO YOU WHEN YOU COMPARED HER SALARY TO EVERYBODY ELSE'S ON THIS LIST, WHO JUST HAPPENED TO BE MEN, THAT IT WAS WAY LOWER THAN THEIRS?

A. THEIR SALARIES DIDN'T COME INTO – INTO IT AT ALL. I WAS REFERRING – I MEAN, IT WAS ALWAYS GOING BACK TO LILLY'S SALARY, NOT ANYONE ELSE'S SALARY.

Q. ALL RIGHT. THEN LET ME ASK YOU THIS: IF IT DIDN'T HAVE ANYTHING TO DO WITH THE MEN'S SALARY, BUT IT HAD TO DO WITH STRICTLY THE FACT THAT SHE WAS BELOW THE MINIMUM, WHY DID YOU LIE TO HER AND TELL HER IT WAS BECAUSE OF HER PERFORMANCE? WHY DIDN'T YOU JUST TELL HER, IT'S BECAUSE YOU'RE BELOW THE MINIMUM?

A. I – I CAN'T RECALL. YOU KNOW, I – MAYBE I DID AND **[*360]** MAYBE I DIDN'T. I CAN'T RECALL WHAT I TOLD MRS. LEDBETTER, BUT YOU HAVE MY DEPOSITION.

Q. ISN'T IT BECAUSE YOU REALIZED, BUT YOU JUST CAN'T ADMIT IT BECAUSE YOU STILL WORK AT THE COMPANY, THAT THIS LADY WAS NEVER PAID LIKE THE MEN –

A. NO, SIR.

Q. – AND YOU DIDN'T THINK IT WAS RIGHT?

A. NO, SIR.

Q. BUT YOU COULDN'T TELL HER THAT; AND THE REASON YOU COULDN'T TELL HER THAT IS BECAUSE YOU'D BE ADMITTING IT, AND THE COMPANY THAT YOU WORK FOR WOULD –

A. SIR, I CAN'T HEAR WHAT YOU SAID.

Q. – I SAID, AND YOU DIDN'T ADMIT IT BECAUSE YOU KNEW IF YOU DID AND TOLD HER THE REAL REASON, THAT YOU'D BE ADMITTING THAT GOODYEAR HAD NOT BEEN PAYING THIS WOMAN WHAT SHE DESERVED?

A. NO, SIR. THAT'S NOT CORRECT.

THE COURT: WELL, ARE YOU SAYING THAT SHE WAS BEING PAID WHAT SHE DESERVED?

THE WITNESS: SIR, SHE – WITH HER JOB RATE, THERE'S A MINIMUM AND A MAXIMUM. OKAY. IT'S MY RESPONSIBILITY TO KEEP ANYONE THAT'S WORKING IN MY AREA OF RESPONSIBILITY ABOVE THE MINIMUM. AND THAT WAS WHAT I WAS DOING. AND I –

THE COURT: SO SHE WAS BEING PAID BELOW THE MINIMUM?

THE WITNESS: AT ONE TIME. YES, Sir. **[*361]**

THE COURT: AND BECAUSE SHE WAS BEING PAID BELOW THE MINIMUM, YOU RAISED HER SALARY?

THE WITNESS: YES, SIR.

BY MR. QUINN:

Q. BUT YOU DIDN'T TELL HER THAT; INSTEAD, YOU TOLD HER IT WAS BECAUSE OF HER PERFORMANCE?

A. NO, SIR. I – I –

Q. THAT'S WHAT YOU TOLD HER? YOU DIDN'T TELL HER IT WAS BECAUSE SHE WAS BELOW MINIMUM, YOU TOLD HER IT WAS BECAUSE OF HER PERFORMANCE, DIDN'T YOU?

A. WELL, MERIT INCREASES WAS REALLY, AT THAT TIME, THE ONLY WAY THAT I WAS AWARE OF THAT WE COULD RAISE SALARIES. AND IT WASN'T COMMON KNOWLEDGE TO SHARE MINIMUM AND MAXIMUM SALARIES AT THAT TIME.

Q. AND NOW, CONVENIENTLY, WE DON'T KNOW WHERE THE '95 SALARIED EMPLOYEE SHEET IS THAT SHOWS WHERE YOU GAVE HER THAT 7.85 PERCENT, WHICH WOULD ALSO SHOW WHERE SHE RANKED IN HER PERFORMANCE GROUP; WE DON'T HAVE THAT DOCUMENT, DO WE?

A. THAT DOCUMENT HASN'T – THAT DOCUMENT HASN'T BEEN PROVIDED TO ME.

Q. DO YOU KNOW WHERE IT IS?

A. NO, SIR.

* * * * *

Arguments on Defendant's Motion for Directed Verdict At the Close of Evidence

[*382]

(IN OPEN COURT, JURY NOT PRESENT.)

THE COURT: ALL RIGHT. I'LL NOW HEAR THE DEFENDANT'S MOTION AT THE CLOSE OF ALL – AT THE CLOSE OF THE PLAINTIFF'S CASE IN CHIEF.

MR. ST. CLAIR: YES, YOUR HONOR.

THE DEFENDANT MOVES FOR A JUDGMENT AS A MATTER OF LAW ON ALL OF THE CLAIMS IN THE CASE.

THE COURT: YES, SIR. THAT MOTION IS DENIED GENERALLY. THE MOTION IS GRANTED WITH RESPECT TO THE THREE DAY SUSPENSION.

* * * * *

[*384]

THE COURT: YES. OTHERWISE, THE MOTION FOR JUDGMENT AS A MATTER OF LAW IS DENIED.

[*457]

AND SHE MUST PROVE THAT EACH CLAIM AROSE WITHIN SIX MONTHS OF HER FILING A CHARGE OF DISCRIMINATION WITH THE EEOC, OR HER COMPLETION AND SUBMISSION TO THE EEOC OF A QUESTIONNAIRE RELATING TO THE CLAIM.

* * * * *

[*459]

AN EMPLOYER SUCH AS GOODYEAR IS REQUIRED, AFTER AN EEOC CHARGE IS FILED AGAINST IT, TO PRESERVE ALL EXISTING PERSONNEL RECORDS RELATED TO THE CHARGE UNTIL THE CHARGE HAS BEEN DISPOSED OF. IF AN EMPLOYER DESTROYS PERSONNEL RECORDS RELEVANT TO THE CHARGE, THEN YOU MAY INFER THAT IF THE PERSONNEL RECORDS HAD BEEN PRESERVED THEY WOULD HAVE BEEN BENEFICIAL TO THE PLAINTIFF AND NOT HELPFUL TO THE DEFENDANT. IN THE ABSENCE OF AN EEOC CHARGE, AN EMPLOYER IS REQUIRED TO PRESERVE THE PERSONNEL RECORDS FOR A YEAR.

PLAINTIFF'S THIRD CLAIM IS THAT AS AN AREA MANAGER, SHE WAS PAID A LOWER SALARY BY THE DEFENDANT BECAUSE OF HER SEX. AGAIN, IT IS UNLAWFUL UNDER TITLE VII FOR AN EMPLOYER TO

DISCRIMINATE ON THE BASIS OF SEX IN THE PAYMENT OF SALARIES TO ITS EMPLOYEES.

IN ORDER TO PREVAIL ON THIS DISPARATE SALARY CLAIM, THE PLAINTIFF MUST PROVE THAT EACH OF THE FOLLOWING TWO FACTS IS MORE LIKELY SO THAN NOT:

FIRST: THAT WHILE PERFORMING THE SAME WORK AS SIMILARLY SITUATED MEN, SHE WAS PAID A LOWER SALARY;

SECONDLY: THAT HER SEX MADE A DIFFERENCE IN GOODYEAR'S DECISION TO PAY HER A LOWER SALARY THAN SIMILARLY SITUATED MALE EMPLOYEES.

* * * * *

[*462]

YOU SHOULD CONSIDER ANY LOST WAGES AND FRINGE BENEFITS WHICH THE PLAINTIFF SUFFERED, BEGINNING SIX MONTHS FROM THE DAY THAT SHE FILED HER EEOC QUESTIONNAIRE AND CONTINUING UP TO TODAY – IF YOU FIND THAT PLAINTIFF'S EMPLOYMENT WOULD HAVE CONTINUED UP TO TODAY.

HOWEVER, IF YOU FIND THAT EVEN HAD THERE BEEN NO DISCRIMINATION OR RETALIATION, PLAINTIFF WOULD NOT HAVE CONTINUED TO WORK UP TO THE PRESENT DATE, YOU WOULD THEN DETERMINE THE DATE ON WHICH PLAINTIFF'S EMPLOYMENT

WOULD LAWFULLY HAVE COME TO AN END. AND THEN AWARD DAMAGES UP TO THAT DATE.

IN ADDITION TO BACK PAY AND LOST WAGES, YOU MAY ALSO AWARD COMPENSATORY DAMAGES FOR MENTAL ANGUISH ARISING OUT OF SEXUAL DISCRIMINATION OR RETALIATION. THESE KINDS OF DAMAGES – DAMAGES FOR EMOTIONAL DISTURBANCE, MENTAL ANGUISH – ARE NOT RESTRICTED TO ACTUAL LOSS OF TIME OR MONEY; THEY COVER BOTH THE MENTAL AND PHYSICAL ASPECTS OF INJURY – TANGIBLE AND INTANGIBLE. NO EVIDENCE OF THE VALUE OF SUCH THINGS AS EMOTIONAL OR MENTAL ANGUISH HAS BEEN OR NEED BE INTRODUCED. IN THAT RESPECT IT IS NOT VALUE THAT YOU ARE TRYING TO DETERMINE, BUT AN AMOUNT THAT WILL FAIRLY AND REASONABLY COMPENSATE FOR THE LOSSES THE PLAINTIFF HAS SUFFERED. THERE'S NO EXACT OR MATHEMATICAL STANDARD TO BE APPLIED; BUT ANY AWARD FOR MENTAL ANGUISH MUST BE FAIR AND JUST IN LIGHT OF EVIDENCE.

* * * * *

[*476]

THE COURT: THE CLERK WILL RECEIVE THE VERDICT.

(HANDING VERDICT TO THE CLERK.)

* * * * *

"QUESTION NUMBER 3: DO YOU FIND IT MORE LIKELY THAN NOT THAT DEFENDANT PAID PLAINTIFF AND UNEQUAL SALARY BECAUSE OF HER SEX?" THE ANSWER IS "YES."

EEOC FORM 5A JAN 78
CHARGE OF DISCRIMINATION

CHARGE NUMBER(S) (AGENCY USE ONLY)
☒ EEOC 042 82 1553 (AMENDED)

NAME: Ms. Lilly Ledbetter
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Jacksonville, AL 36265
COUNTY: Calhoun

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME. (If more than one list below).

NAME: Goodyear Tire & Rubber Company
TELEPHONE: (205) 546-6341
STREET ADDRESS: 922 Meighan (East) Boulevard
Gadsden, AL 35903

CAUSE OF DISCRIMINATION BASED ON MY (Check appropriate box(es))

☐ **RACE** ☐ **COLOR** ☒ **SEX** ☐ **RELIGION**
☐ **NATIONAL ORIGIN** ☐ **OTHER (Specify)**

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE: May 14, 1982

THE PARTICULARS ARE:

I. On May 14, 1982, I was demoted from my position in process control and transferred to a job in quality control. I have been employed since February 5, 1979. The employer has more than 15 employees.

II. Jerry Jones, personnel, and Chuck Fritz, division superintendent, told me I was being transferred because

I could not stay in process control after I had complained about being sexually harassed by my supervisor. They also stated that I was not performing up to standard after I complained of sexual harassment.

III. I believe I have been discriminated against because of my sex, female, inasmuch as:

1. Effective in February 1982, I received a merit increase in my salary because according to Mr. Fritz I was doing a good job.

2. Although the employer is not classifying my transfer as a demotion, I am performing less desirable tasks and I am not fully qualified for the jobs in quality control because I have not been trained. Also, I am no longer classified as a supervisor.

3. I reported to Mr. Jones and Mr. Fritz that my immediate supervisor, Lother Yarbrough, who is classified as a uniformity specialist was sexually harassing me by making sexual propositions, touching my body, constantly talking to me in explicit sexual terms, and threatening that he will have my job if I do not submit to his demands.

4. Mr. Jones and Mr. Fritz told me they would conduct an investigation. They indicated that Mr. Yarbrough admitted to them that he had done those things of which I had accused him, except touching by breasts. They told me that Mr. Yarbrough would remain on his job but I would be transferred.

5. It should be noted that Mr. Yarbrough has the reputation of being a womanizer.

6. I have not received the same training as men in a number of positions, including supervisor in Dept. 555 and Dept. 541, process control and most currently, in quality control.

IV. Females as a class have been victimized by sexual harassment on the job at Respondent's Gadsden plant.

(ORIGINAL CHARGE FILED ON 06/08/82)

I will advise the agency if I change my address or telephone number and I will cooperate fully with it in the processing of my charge in accordance with its procedures.

I declare under penalty of perjury that the foregoing is true and correct

DATE_____
CHARGING PARTY (Signature)_____

CHARGE FILE COPY

STATE OF ALABAMA)
)
COUNTY OF CALHOUN)

AFFIDAVIT

Ms. Lilly Ledbetter, being first duly sworn says, based upon her own personal knowledge, as follows:

1. I am the charging party in E.E.O.C. Charge No. 042821553 against Goodyear Tire and Rubber Company, Gadsden, Alabama.

2. I have been asked to briefly describe the sexual harassment I have endured in my employment at Goodyear. I have also been asked to describe how I was denied training opportunities that were otherwise available to male supervisors.

3. During the period June, 1979 to July 1, 1980, I was supervisor in Department 543 and I supervised twenty-two (22) people, and I was a supervisor in Department 541, and I supervised sixteen (16) people.

4. During this period the shift foreman, Mr. Bill Edwards, told me that the bra I was wearing appeared to be a french bra because it "had those things high and my nipples were showing". Mr. Edwards often referred to my department as the department that appeared like a "whorehouse". Mr. Edwards also told me that "if I kept bending over at the file cabinet, I might get something rammed in my a. . that I did not want."

5. I was supervisor in Department 555 from July 1, 1980 until June 30, 1981. The department foreman, Mr. Mike Maudsley, evaluated my work in March, 1981. He asked if I was married and said he wanted to date me. He talked to me almost five hours about himself. He told me that he was rating me number 11 out of 12 employees, but I could move up to a number 5 or maybe a number 3 rating if I

would meet him at the Ramada Inn. I asked how he could justify the low rating based on my job performance and he said it was more important that my bosses like me. During this period of time, I was supervising nineteen (19) people.

6. I transferred to Process Control on July 1, 1981. My supervisor was Lother Yarbrough. Lother Yarbrough constantly told me intimate details regarding his sex life. In August he told me that Goodyear people were saying how I would be his next woman. In December he started telling me I would have to love him because his woman threw him out. I did nothing to encourage this behavior and did not welcome this behavior at all. I told this to Mr. Yarbrough. I also told him I was not qualified to help him with his own personal problems. Starting in January, 1982, Mr. Yarbrough seemed obsessed with his requests and propositions for me to go to bed and have sex with him. He said we would be a great pair. When I refused him, he told me my job with Goodyear depended on him and he could get my job if I did not please him. He said if I would do all the things he wanted me to do, then I would have an opportunity for advancement. Otherwise, my job was in jeopardy.

Mr. Yarborough regularly propositioned me to go to his house and go to bed with him so that we could forget our problems. He would tell me to hold my shoulders back so my "boobs" would stand out. He told me on one occasion that I did not appear to have on a bra. He regularly said how he could see every curve of my body through my clothes.

On May 10, 1982, while testing tires, Mr. Yarbrough kept putting his hands on me. He rubbed his hands up and down and around on my back and touched my breasts. I quickly moved away from him. Then he said, "now that you have got me worked up what are you going to do about it?"

I told Mr. Yarbrough that I would do nothing about it. He reacted by overloading me with work and refused to provide me with assistance. When I complained about my

work load, Mr. Yarbrough told me that I had not pleased my boss and that he was going to have my job.

7. When I was transferred to Department 541 and later to Department 555, I received no training whatsoever.

8. The supervisor training which was available after I transferred to Process Control was not made available to me. I had asked whether I could secure this training, but I was told that I would not need the training.

9. In January, 1982, Goodyear scheduled statistic classes for employees and I was not included in these classes.

10. In March, 1982, I was not permitted to attend an E.E.O.C. seminar for supervisors.

11. In May, 1982, I complained about the fact that I had not received the degree of training and education that males had received from the Company. Mr. Bullock told me that Goodyear did not care if I had any further training or education.

/s/ Lilly Ledbetter
Lilly Ledbetter

STATE OF ALABAMA)
)
COUNTY OF CALHOUN)

I, the undersigned authority, a Notary Public in and for said County and State, do hereby certify that Lilly Ledbetter, whose name is signed to the foregoing Affidavit, appeared before me on this date and after being duly sworn by me deposes and says under oath that the matters contained in the foregoing Affidavit are true.

Witness my hand and official seal on this 26th day of January, 1983.

/s/ Debbie Snow
NOTARY PUBLIC

THE GOODYEAR TIRE & RUBBER COMPANY

BOOK I
MECHANICAL

1. R. HOLMAN	88%	36. B. MILLER	50
2. L. LEDBETTER	81	37. B. HEAD	49
3. B. POWELL	77	38. M. LEVINSON	49
4. C. OWENS	76	39. D. PASLAY	45
5. R. FORTENBERRY	76	40. N. MURPHY	45
6. D. BELYEU	75	41. R. TAYLOR	43
7. J. SHEARS	74	42. P. ELROD	42
8. G. GRAHAM	74	43. ?. CRAWFORD	36
9. L. HUGHES	74	44. E. HARPER	35
10. S. THOMPSON	72	45. S. DOUGLAS	34
11. R. MAXWELL	72	46. B. MAJOR	23
12. M. TUCKER	69		
13. K. TIDEMORE	69	INCOMPLETE	
14. P. THOMAS	66		
15. P. MCLEOD	66	1. W. DAVIS	
16. G. PAYNE	66	2. J. KELL	
17. K. KOEHLER	66	3. A. DRINKARD	
18. J. GARRISON	65	4. J. PIKE	
19. C. SMITH	65		
20. R. GOSS	65	BOOK II	
21. J. MOON	63	ELECTRICAL	
22. G. NELSON	63		
23. G. RUSSELL	63	1. K. KOEHLER	96%
24. B. PHARES	60	2. C. OWENS	94
25. T. HOLLINGTON	59	3. R. MAXWELL	94
26. T. MAGOURIK	59	4. L. LEDBETTER	94
27. B. MYERS	59	5. D. BELYEU	93
28. D. BARNES	59	6. R. HOLMAN	92
29. G. HOWZE	57	7. G. PAYNE	92
30. P. JODAN	54	8. G. GRAHAM	89
31. M. ATKINS	54	9. B. THOMAS	89
32. W. CHAPMAN	52	10. S. THOMPSON	88
33. B. THOMAS	52	11. T. MAGOURIK	87
34. J. BONDS	51	12. G. RUSSELL	87
35. A. KISNER	50	13. B. MYERS	86

14. J. SHEARS	84
15. J. GARRISON	84
16. M. TUCKER	84
17. R. FORTENBERRY	84
18. N. MURPHY	83
19. R. GOSS	82
20. P. JODAN	82
21. L. HUGHES	82
22. A. DRINKARD	81
23. J. KELL	77
24. G. NELSON	77
25. J. MOON	77
26. T. HOLLINGTON	77
27. J. PIKE	77
28. W. CHAPMAN	76
29. B. PHARES	76
30. D. PASLAY	75
31. M. LEVINSON	74
32. P. MCLEOD	74
33. W. DAVIS	73
34. P. THOMAS	73
35. A. KISNER	72
36. C. SMITH	70
37. G. HOWZE	70
38. J. BONDS	70
39. B. MILLER	68
40. M. ATKINS	67
41. E. HARPER	65
42. R. TAYLOR	52
43. B. MAJOR	34
44. S. DOUGLAS	32

INCOMPLETE

1. K. TIDEMORE
2. B. POWELL
3. B. HEAD
4. D. BARNES
5. P. ELROD
6. ?. CRAWFORD

* * * * *

TO: A056756 GADSDEN6 Ledbetter, L.M.

FROM: A055008 GADSDEN6 Jones, J.F.

DATE: FEBRUARY 4, 1992
SUBJECT: RLT assignment
F

Congratulations on your new assignment, you have worked very hard and have made a lot of improvement in the last few years and deserve the opportunity. J Jones
F
F

TO:

FROM: A030302 GADSDEN6 Whiteman, K.

DATE: AUGUST 20, 1992
SUBJECT: Past 8 months

Steve, Dick, Jimmy and Lilly

I just wanted to tell the 4 of you that the past several months have been the most rewarding of my Goodyear career. The things that you 4 have accomplished have really been exceptional and I am proud to have worked with you. Keep the momentum going, and I know you will, and remember to make decisions based on what is the right thing to do. Thanks for all the help, support and teaching you have done for me. Call or stop if I can ever be of help.....Kim

PAY FOR PERFORMANCE
GOODYEAR
Salary Compensation Program

INTRODUCTION

As Goodyear continues to unfold its competitive strategy in the marketplaces of the world, the management of all resources will play a growing and vital role in our company's future. The most crucial resource is our team of Goodyear associates. It is increasingly important that we not only hire the best people, but that we make absolutely certain our associates are compensated fairly in return for the contributions they make toward our success.

Goodyear recognizes that associates would like to know more about their salaries, how they are determined, how their performance is rewarded, and how pay increases are planned and administered. This booklet is intended to share with you, in general terms, guidelines which have been provided annually for managers to assist them in performance appraisals and salary compensation programs. We encourage our associates to get answers not found in this booklet from their managers or Personnel Departments.

Reaching our corporate objectives requires a team effort from all our associates. It is management's objective to assure that the proper tools, training and incentives are in place so that associates have the opportunity to perform at their best, and are properly and competitively rewarded for their contributions.

This booklet conveys how highly Goodyear values performance and strives to make the best use of its payroll dollars to recognize and reward our salaried associates.

P2

SALARY COMPENSATION PROGRAM

As a salaried associate of Goodyear, you likely have a natural curiosity about your salary and the policies that determine how Goodyear salary ranges are established for various jobs. Since salaries represent one of our largest expenditures, we want to be sure that we spend our salary dollars effectively. That means paying salaries which help us attract, retain, and motivate

deserving associates. Goodyear's salary compensation program is designed to accomplish these goals. We believe that our salaried associates should understand salary compensation policies and how they work. We have prepared this booklet to explain the basic elements of our salary program. The following pages will give you a better understanding of the process we use to accomplish our salary compensation objectives and manage our salary dollars.

GOALS OF THE SALARY PROGRAM

Your salary probably ranks high on the list of things that are most important to you and you want to know that you're paid fairly for the work you do. Your salary is just as important to the Company as it is to you. We spend a lot of time and effort testing the fairness of our salaries, and making sure they are competitive with others in the job marketplace. For Goodyear to achieve its compensation objectives, our program must pay salaries that:

- are fair and equitable within the Company (internal equity)
- are competitive in the marketplace (external competitiveness)
- reward individuals on the basis of their performance (pay for performance)

P3

WHAT DO THESE OBJECTIVE MEAN?

Internal Equity – The value of a job within the company depends on numerous factors, among which are technical knowledge required, the complexity of the work and the decision-making authority involved. The more difficult or demanding the job is, the higher its pay level should be. Pay levels for jobs reflect the relative value of the jobs within the Company.

External Competitiveness – Through salary surveys, we compare our salaries to those paid by other companies for

similar positions. We want to be sure that our salaries attract and retain the best talent.

Pay for Performance – Once we establish a salary structure that's internally equitable and externally competitive, your performance on the job is a major factor in determining your pay within the salary range.

P4

HOW OUR SALARY PROGRAM WORKS

Listed below are the main elements of Goodyear's Salary Compensation Program:

1. ***POSITION DESCRIPTION*** – outlines and describes in broad terms the content of your job.
2. ***EXEMPT or NON EXEMPT?*** – analysis to determine whether a job will be classified as exempt or non exempt.
3. ***POSITION EVALUATION*** – determines the relative value of the position and defines the value in terms of Hay points or job levels.
4. ***SALARY RANGES*** – conversion of Hay points or job levels into specified salary ranges.
5. ***PERFORMANCE APPRAISAL*** – provides an opportunity for you and your manager to assess your performance on designated elements of your job.
6. ***MERIT INCREASE GUIDELINES*** – assist management in administering the merit budget allocation.
7. ***PROMOTIONAL INCREASE POLICY*** – outlines the requirements of a promotion, and how the position change may affect your salary.

P5

The following pages will expound upon each of these elements, then conclude with comments on the selection of associates for job changes.

P6

POSITION DESCRIPTIONS

Accurate and thorough position descriptions are the primary sources of information for performing position evaluations. Position descriptions outline the major functions and responsibilities, as well as the problems and challenges in the job. They are used primarily in position evaluation, position comparisons, and performance appraisals for comparing your accomplishments to your responsibilities.

The description provides you and your manager with the basic content of job functions identifying major responsibilities and reporting relationships. It is reach manager's / department's responsibility to ensure that position descriptions are reviewed regularly and reflect current and accurate information. If your job responsibilities have changed significantly since the description was written, bring the changes to your manager's attention. After any new, revised, or updated position has been approved by the department / division management, it should be forwarded to the Salaried Compensation Department for review to determine the appropriate Hay point rating or job level.

EXEMPT OR NON EXEMPT?

Once a position description is received by the Salaried Compensation Department, a determination is made on whether a job is exempt or not exempt from the provisions of the Fair Labor Standards Act of 1938. This Act, commonly called the "Wage and Hour Law", covers many topics such as minimum wage, employment standards for minors, and overtime regulations.

Whether or not a job is exempt from the provisions of this Act depends on several factors, such as work responsibilities and education or training necessary to perform the job. Also, various guidelines and tests

established by the Act help determine if a position meets the criteria for exempt status.

P7

POSITION EVALUATION

The tern "position evaluation" refers to the method we use to establish the relationship between positions. This is done by comparing one position to others within Goodyear as well as considering its contribution to the achievement of Company objectives. The evaluation focuses entirely on the position, NOT on the performance of the individual in that position.

EXEMPT POSITIONS are evaluated under the professionally developed process called the Hay Job Evaluation System. Using the Hay System we determine a point value for each position in terms of three main factors – Know-How, Problem Solving and Accountability.

- KNOW-HOW measures the skills, education, and experience necessary to perform a particular job. The evaluation considers the specialized, technical, or practical knowledge required by the job along with an assessment of managerial and human relation skills.

- PROBLEM SOLVING measures the degree to which "know-how" is used to identify, define and solve job related problems. The creativity, overall complexity, and the type of thinking challenge needed in performing the job are assessed.

- ACCOUNTABILITY measures the amount of personal and [P8] procedural control to which the position is held responsible. The assessment of accountability is based upon the freedom to act and implement decisions, impact of the job on end results, and the size of the area (expressed in dollars) most clearly affected by the job.

Each position is analyzed using these components, and Hay points are assigned for Know-How, Problem Solving, and Accountability based on the relative value of this position to other positions within the Company.

When the position evaluation is completed, the points for each of the factors are added together to get a total point value for the position. From time to time, Goodyear point totals are correlated with similar position in other companies evaluated under the Hay System to help insure evaluation correctness.

Once established, the point total is multiplied by a formula that establishes a salary range for the position. Salary ranges are also compared to market pay data and national surveys to validate the competitiveness of ours alary ranges.

NON EXEMPT POSITIONS are evaluated by comparing each job to similar positions outside Goodyear and other positions within the Company. Incorporating both factors, external competitiveness and internal equity, we determine a fair value for the job. Once these comparisons have been made a job level (often called a "pay grade") and salary range is assigned.

P9

SALARY RANGES

After the job evaluation process, each exempt and non exempt position is assigned salary range. A salary range consists of a minimum, midpoint, and maximum dollar value. Salary range midpoints are designed around an average market salary which reflects the current prevailing value of the position in the marketplace. Salary ranges are calculated so that the range maximum is 50% grater than the range minimum. This range spread is established to allow for differences in pay that recognize individual differences in qualifications, experience, and performance.

We make sure Goodyear salary ranges remain competitive by participating in surveys which tell us what other companies are paying for positions similar to those in our Company. Each year a review is made to determine whether all ranges are in need of adjustment to stay competitive in the marketplace.

[PP10-11 MISSING]

P12

MERIT INCREASE

Like other major expenditures in a well-managed business, merit increases are controlled by an approved budget. We refer to such a budget as a "merit budget" because it establishes the amount of merit funds to be available each year for merit increases. Recommendations concerning the size of Goodyear's merit budget are generally made around the end of each year for the following year. Although many factors are considered, some of the most important considerations are:

- the current level of each position's salary in relation to pay practices of other companies on a local and national basis,
- projections for the coming year regarding merit budget activity of other major companies on a national basis,
- economic conditions in general,
- and Goodyear's business objectives, profitability and ability to afford a merit budget in a given year.

Each department/division is allocated a portion of the total merit budget approved for the year. This allocation is derived from the amount of the department's/division's total base salary.

Every year managers responsible for administering departmental or divisional merit programs are provided with approved merit increase guidelines. These guidelines establish the minimum and maximum increase percentage which may be granted, the minimum time interval between increases, and other such details.

P13

In determining how much of a merit increase you will receive, and how frequently you receive it, your manager will make into consideration factors such as:

- your job performance
- where your salary stands within the range
- amount and timing of your last merit or promotional increase
- amount of available merit increase funds

P14

PROMOTIONS

A job change is considered a promotion when *both* the nature of the job and the level of the job meet these qualifications:

- Nature of the job changes–

  This means an associate transfers to a new position which entails noticeable differences in job content and increased responsibility. A movement through a salary classification having a series of levels (eg: Accountant I, Accountant II, Accountant Senior, or Engineer, Staff Engineer, Senior Engineer) is not considered a promotion.

- Job level changes–

  EXEMPT ASSOCIATES: the new position must be ten percent or higher in Hay points than the present position to be considered a promotion.

NON EXEMPT ASSOCIATES: the new position must be two or more salary job levels higher than the present position to be considered a promotion.

There are occasions when a transfer, which may not represent an official promotion according to the guidelines above, can enhance an associates' [sic] personal growth and development. As a result, the transfer may improve future opportunities for advancement.

When promoted under the current policy, you may be granted an increase of up to 15 percent of your base salary if the proposed salary falls below the salary range midpoint of the new position; or up to 10 percent if the proposed salary falls above the new salary range midpoint.

P15

ASSOCIATE SELECTION

Selecting associates for transfer or promotion begins by identifying candidates that possess the critical skills, experience and knowledge necessary to perform the position's responsibilities.

The process of identifying candidates for a job opening involves utilization of various resources depending on the opening, available candidates, and location of the opening.

Goodyear encourages associates to participate in the SKILLS BANK and use the JOB AWARENESS SYSTEM tools. These tools are designed to assist in identifying candidates who might not have been otherwise considered for a new opportunity.

Goodyear accepts its obligation to identify and include qualified protected group members as candidates for promotional opportunities.

Final selection is based upon the candidate's qualifications, performance, experience, education, interest, attendance and the interview process.

P16

SUMMARY

The material presented in this booklet is designed to answer most general questions abut Goodyear's salary compensation program. If, after reading its contents, you have any questions, you are encouraged to discuss them with your department manager.

As the company faces the future of global competition it is imperative that staffing levels be maintained that optimize productivity and cost effectiveness. Qualify of performance, which is often an individual choice, is essential both for the associate and Goodyear.

Our salary compensation program gives YOU the opportunity for higher earnings. The degree to which you take advantage of this opportunity depends on your daily performance on the job. Your greatest salary opportunities come from you . . . pay for your performance.

Goodyear wants to give each associate the opportunity to make use of this or her talents—the right person in the right job, paid accordingly. This will help assure continued growth of Goodyear, thereby opening new avenues for individual advancement and the opportunity for high earnings.

Our salary compensation programs provide flexibility for our managers in recognizing and rewarding individual performance. These guidelines are an advisory tool for managers and have never been intended to be a binding contract. They are subject to revision at any time as circumstances warrant.

The Goodyear Tire & Rubber Company

Akron, Ohio 44316 – 0001

Vice President

January 8, 1996

To: All Managers Who Administer Salary Increase Budgets
Subject: **Salary Compensation Guidelines for Calendar Year 1996**

In January of last year, we announced the 1995 Corporate Compensation Plan for salaried associates. This plan was significantly different than previous years' compensation plans.

The components of the 1995 compensation system were designed to: 1.) encourage and recognize significant levels of individual performance through Individual and Top Performance Awards and 2.) Provide all associates an opportunity to share in the financial results of the company through the Associates Performance Plan. These components were implemented to help achieve levels of performance necessary for our future success as a global company and to more directly align total compensation with business objectives and results.

As part of the compensation system implementation process, these new pay components were evaluated and measured during the year to ensure fairness and that design objectives were being met. In this ongoing analysis process, it was determined that program objectives were met and that these new components should be carried into 1996.

Details of the 1996 Corporate Compensation Plan are outlined in the attached letter. In summary, the 1996 Plan contains:

1.) Individual Performance Awards
2.) Top Performance Awards
3.) the Associate Performance Plan

Critical to the success of the 1996 Compensation Plan are quality performance appraisals. These are critical to help managers determine eligibility for various performance awards but also to

provide a basis for discussion with associates on how individuals can increase performance levels.

Your cooperation was essential to the successful implementation of the 1995 Plan. Your future support will help assure continued success in 1996.

/s/
Vice President
Human Resources & total Quality Culture

M L Burns
mlbguide.ltr

THE GOODYEAR TIRE & RUBBER COMPANY
PERSONNEL POLICY & PROCEDURE LETTER
AKRON, OHIO

DATE: January 8, 1996 SC NO 61

SUBJECT: **1996 CORPORATE COMPENSATION PLAN**

TO: ALL MANAGERS WHO ADMINISTER SALARY INCREASE BUDGETS

This letter outlines salary administration policies and guidelines to be administered during calendar year 1996 (1-1-96 through 12-31-96) for salaried associates under the Corporate Compensation Plan. Coverage includes the following locations:

Akron corporate Headquarters
US Expatriates at International Locations
Non-Retail field Locations
San Angelo and all Parent Company Plant Locations (not including traditional hourly associates at Lawton, Mt. Pleasant, Bayport, Beaumont, Norfolk, San Angelo, Asheboro, Spartanburg and Greenville)

Purpose

The purpose of this letter is to set forth policies and guidelines designed to provide equitable and consistent salary associates covered by the Corporate Compensation Plan. Any deviations or exceptions to these policies must be submitted to Salaried Compensation (D/804), Akron, for review and management approval.

APPROVALS: ISSUED BY: Salaried Compensation

OFFICERS OF THE COMPANY	TIRE DIVISION	GENERAL PRODUCTS DIVISION	FINANCE DIVISION	GEN COUNSEL & SECRETARY'S DIV	HUMAN RESOURCES	PUBLIC AFFAIRS
S F Gibara					E S Lucas	
M L Burns					F Martone	
				RESEARCH & DEVELOPMENT		OTHER

I. DEVELOPMENTAL PROGRAM PROVISIONS

The Developmental Increase program that was implemented in 1994 for exempt associates will continue into 1996. This program was implemented to help:

- Recognize and reward associates that accept career development job assignments that are not promotions and are significant moves that cross business, product, function, division, or developmental lines.
- Create and promote a more flexible work environment intended to enhance associate value, skills and competencies.

A. Defining Developmental Moves

Not all lateral or downward moves are considered as career development moves. To be considered as a career development move and eligible for a Developmental Increase, a position change:

- Must be part of an individual's long term career development/succession plan that has been approved by the Vice President Human Resources Planning, Development and Organization and the principal officer of the requesting division.
- There must be a significant change in an associate's function, department, division or location that encompasses acquiring a new set of skills or competencies that emphasizes diversity of functions outside an associate's existing level/area. A physical change must also take place.

B. Developmental Increase Guideline

Associates approved for a developmental assignment may receive a Developmental Increase of up to 10% of base salary (or lump sum). Granting the increase would start a new interval towards performance award eligibility. Factors taken into consideration in recommending the amount of a Developmental Increase would be position in the new salary range,

performance, salary of peers, length of time to be on the developmental assignment and closeness to the individual's last increase.

Individual G565s requesting consideration for this program must be coded as DI (Developmental Increase) and processed through the office of the VP Human Resources Planning, Development and Organization. A letter of justification must be included with the proposed increase stating the associate's long term career path and an explanation as to how the developmental assignment fits within the identified career structure. The letter and G565 must be approved by the principal officer of the division. Commitments to associates should not be made until the proposed increase receives final approval by the division officer and Vice President Human Resources Planning, Development and Organization.

II. PERFORMANCE AWARD PROVISIONS

For 1996, the performance award systems introduced in 1995 will be continued. These two systems are the:

1) Individual Performance Award (IPA)
   - For competent and above average performers

and

2) Top Performance Award (TPA)
   - For only the highest level of individual performance and contribution in an organization. Limited to not more than 30% of the number of salaried associates in an organization.

Each current merit budget manager will receive a 1.7% allocation for Individual Performance Awards. Function/Business Unit Leaders will receive a separate 0.8% allocation for Top Performance Awards. Details of these performance award systems follow.

A. Individual Performance Award Policy

As outlined in various communications, the Individual Performance Award (IPA) is one of the first steps in moving from our traditional merit programs of the past.

IPAs are intended to be granted only to the good competent and above average performer/contributor. Based on allocations and performance criteria, not all associates will receive a performance award during the year. Managers will be faced with very difficult decision in using the IPA as it was intended. It is not intended as a general increase, cost of living or longevity based pay system.

Demonstrated performance/contribution is the key in consideration for an IPA. In using the IPA, there are several guidelines that should be followed. These apply to exempt and non-exempt associates equally.

1) An allocation of Individual performance Award funds will be made along the same lines of our previous merit allocations. Old Merit Budget numbers will be retained but they will be called Individual Performance Award Allocations. A 1.7% allocation will be established in 1996 for Individual performance Awards (1.7% of 12/31/95 base salaries). Allocations will be released in late January or early February-increases may be retroactive to January 1, 1996.

2) The maximum amount of IPA will be 5.0% and can be granted as a base salary adjustment, lump sum (calculated on annual base salary) or a combination of both not to exceed 5.0%. Base salaries cannot increase above salary range maximums. Proposed increases should be coded on G-565s as IP (Individual Performance Award) or PI (Individual Performance Award Lump Sum).

3) The average amount of increase for any group of associates receiving IPAs must be greater than the IPA allocation percent. As an example, if the IPA allocation is 1.7% of salaries, IPAs granted must average more than 1.7%.

4) The minimum time interval from the last increase (developmental, promotional or performance) is 12 months. The average interval for any group (department, division, plan) receiving IPAs must be greater than 12 months. For exempt associates, this average must not be

less than 14 months and non-exempt associates must average not less than 16 months. This excludes top performers.

5) A plan for IPA consideration should be made for each associate and approved in January. This plan should be followed through the year. The process is the same as required under the former merit system.

6) The primary factor in determining eligibility and amount of award is performance and contribution to the organization. Higher levels of performance and contribution should be recognized by greater and more frequent IPAs.

7) IPAs may be granted within these general guidelines but not to exceed them. Allocations for Individual Performance Budgets may not be exceeded. Funds not utilized by 12/31/96 will be cancelled.

Individual Performance Award Summary

Allocation: 1.7%
Eligibility: Salaried Associates (Exempt and Non-exempt) - competent and above average performance.

- Individual Performance Awards of up to 5.0% of base salary (regular) or annual salary (lump sum) or a combination not to exceed 5.0% may be granted.
- Minimum interval from last increase (developmental, promotional or performance)-12 months. Average interval of those receiving IPAs (Excluding Top Performers): Exempt-not less than 14 months, Non-exempt-not less than 16 months.
- Average amount of increase of those receiving an IPA **must be greater than 1.7%.**
- Salaries-cannot exceed salary range maximum.
- Not intended for longevity or cost of living considerations.
- allocation based on 12.31.95 salaries.

B. Top Performance Award Policy

In structuring the performance award system, a second type of performance award called a Top Performance Award (TPA) may also be granted.

It is critical that TPAs only be granted to those individuals who have demonstrated through value added contributions, that they are in fact the top performers in the company.

It has been established that only up to 30% of the total number of associates in a function, department, business unit or division be considered as eligible for a TPA. This means that 30% is the maximum number of associates in your area that can receive an award and less than 30% is acceptable and in some cases a desirable number.

Function/Business Unit leaders will receive a 0.8% TPA allocation calculated on the base salaries (as of 12/31/95) of associates under the Function//Business Unit. It is up to the Leader to manage the allocation and properly distribute it within the intent of this program.

It is suggested that the process of nominating associates to be considered for TPAs start at as low a level as practical (Dept Manager, Plant Manager, Director). Each function/Business Unit Leader should review TPA candidates and make final determinations based on performance evaluations, performance rankings, succession planning and other such criteria that relates to performance/contributions.

Based on funding available, not all nominated for a TPA will be able to receive a maximum amount. In cases where proper planning is not done, allocations will be depleted without adequately recognizing top performers.

The Top Performance Award system has been structured so that the first TPA granted in any year must be combined with an equal amount from the Individual Performance Award (IPA) fund. As an example, if a 6% performance increase is considered for a top performer, 3% must be funded from the Individual Performance Award allocation and 3% from the Top Performance Award allocation. These

must be granted on the same date. Once the combined increase is granted, a top performer may receive another TPA of up to 5.0% on a minimum time interval of 6 months from the effective date of the combined performance increase.

As an example, a top performer could receive a 6% Performance Award (3% TPA, 3% IPA) on 2/1/96 and up to an additional 5% TPA on or after 8/1/96. This feature was designed to give the flexibility of rewarding the top performers both in interval and amount without going through the policy exception process. These types of dual performance awards were intended to be used to reward and recognize the uppermost level of top performer.

All Top performance Awards must be approved by the Function/Business Unit Leader (or designee). Proposed increases should be coded on G-565s as TP (Top Performance Award) or TL (Top Performance Award-Lump Sum) along with the proper coding for Individual Performance Awards (IP,PI).

Top Performance Award Summary

Allocation: 0.8%
Eligibility: Salaried Associates (Exempt and Non-exempt)-highest levels of performance only.

- Awards are intended to be granted to recognize only the highest level of individual performance and contributions in an organization.
- Limited to not more than 30% of the total number of salaried associates by policy officer.
- Function/Business Unit leaders will be granted a top performance Award Allocation to be administered by that Leader.
- Top Performance Awards of up to 5.0% of base salary (regular) or annual salary (lump sum) or a combination not to exceed 5.0% may be granted.
- The first TPA granted in any year must be used in conjunction with an Individual Performance Award (IPA)

of an equal amount. A minimum interval of 12 months from the last increase (developmental, promotional, or performance) is required.

- A second TPA (up to 5.0%) may be granted to a top performer in any year (12 mos). There must be a 6-month interval from the last TPA (not to be used in conjunction with any other award/increase).
- Top Performance Awards require function/Business Unit Leader (or designee) approval on the G-565.
- Allocation amounts may not be transferred to the Individual Performance Allocations.
- Salaries cannot exceed salary range maximum.

C. Performance Award Administration

1) Performance Appraisal

Since quality individual performance appraisals are a critical factor in determining performance awards, annual performance appraisals are mandatory. Annual performance appraisals should be completed within the established schedule for your division.

2) Planning of Performance Awards

An associate's salary should be reviewed at least once annually.

Effective administration of performance awards requires both pre-planning and follow-up at frequent intervals. The quarterly Performance Planning report is provided by Department 604 (Payroll/Personnel Information) for your use as an aid in reviewing and planning your Performance Award program. A Salaried performance Award Planning Document (Attachment I) has been designed to assist you in this process.

In planning performance awards to be granted during the year, each manager should carefully review the following items:

a. The amount and timing of each associate's past salary treatment.
b. Performance of the associate.
c. Present Performance Award guidelines.
d. Position within salary range.
e. Amount of available performance award allocations.

As part of the 1996 Program, each division will be required to submit a detailed merit plan to the officer of the division for approval. This plan must show individuals, dates and amounts of Performance Awards proposed for 1996. Plans must be approved by the head of the division prior to any increase being granted.

3) Exceptions to Performance Award Guidelines

Performance Awards which are below the minimum time interval, exceed the salary range maximum, or exceed the maximum guideline amount will require approval as exceptions to policy.

Such an increase should be clearly identified as a "Exception to Policy" in the explanation section of the G-565 at time of origination, and include justification for granting the exception to policy. Salary Records (D/604) will then route for management approval. Any G-565's not meeting these requirements will be returned to the originator.

All increases that are exceptions to policy and all increases coded "Miscellaneous" will be routed to the Director Global Compensation and the principal officer in charge of the division (or higher authority depending on the level of the proposed salary) for review and approval.

III. ASSOCIATE PERFORMANCE PLAN

A broad based results sharing plan called the Associate Performance Plan (APP) will be continued in 1996. This plan provides a potential lump sum payout to eligible associates in February 1997 based on 1996 company performance. The APP will include most associates covered under this letter.

The plan is structured to provide a lum [sic]sum payout of 2.5% of 1996 annual base salary if 100% of performance targets are reached. Based on actual attainment of targets, the 2.5% could increase to 3.75% (if performance reaches or exceeds 150% of target) or could be reduced to as low as 0% (zero) based on sub target performance.

Performance measures for 1996 will include **Cash Flow and Earnings Before Interest and Taxes (EBIT).** Performance targets to these measures will be set by executive management for 1996 performance. The following provides an example of how the plan will work:

1996 Performance to Target Examples

% of target performance achieved in 1996	Actual payout % of annual base salary
150% or above	3.75% of base (2.5%x150%)
124%	3.10% of base (2.5%x124%)
100%	2.5% of base (2.5%x100%)
76%	1.90% of base (2.5%x76%)
24%	0.60% of base (2.5%x24%)
0%	0.00 of base (2.5%x0%)

1996 plan details will be provided to all associates in the future.

IV. PROMOTIONAL INCREASE POLICY

The following policies and guidelines are applicable to promotional increases:

A. Promotional increases will be administered under the following policies for 1996.

Exempt Positions: A promotional increase may be granted when an associate transfers to a position with a definite change and increase in responsibility and which is evaluated at one or more exempt grades higher than the position to which the associate is currently assigned.

Non-Exempt Positions: A promotional increase may be granted when an associate transfers to a position with a definite change and increase in responsibility and which

is evaluated at one or more non-exempt grades higher than the position to which the associate is currently assigned.

B. On moves from non-exempt to exempt positions, a promotion is defined as a transfer to a position with a change and increase in responsibility where the salary range midpoint of the exempt position is greater than the non-exempt position.

C. A promotional increase up to 15% of an associate's current base salary may be granted if the proposed salary does not exceed the salary range maximum of the new position.
   - An additional amount of up to 5% may be granted when the promotion results in an increase of two (2) or more grade levels.
   - In cases where an associates' [sic] salary, with the promotional increase, is below the salary range minimum of the new position, an additional promotional amount will be granted to immediately bring the proposed salary to range minimum.

D. A promotional increase must be processed within 90 days of the effective date of promotion. Increases initiated after 90 days must be considered as performance awards.

E. Movement through a salary classification having a series of ranges (eg Accountant I, Accountant II, Accountant Sr. or Engineer, Staff Engineer, Sr Engineer) is not considered promotional and associates involved in such title changes are not eligible for promotional increases.

F. There are situations where, due to job reevaluation, the grade of a position is increased. In most cases this is due to restructuring of a department or division, where responsibilities are added to an existing position. In some instances, the incumbent stays on the old job and basically performs the same functions of the old job plus the new responsibilities. In those situations where the same individual is performing the same basic job functions but, due to reevaluation, the grade is increased,

there must be at least a two grade increase in job grades before a promotional increase may be considered within policy.

G. Exceptions to the above guidelines must be approved by the Director Global compensation and principal officer in charge of the division, or higher authority depending upon the level of the proposed salary. Such an increase should be clearly identified as an "Exception to Policy" in the "Explanation" section of the G-565 at time of origination, and include justification for granting the exception to policy. Salary Records (D/604) will then route for management approval. Any G-565's not meeting these requirements will be returned to the originator.

V. PROPER NOTIFICATION OF SALARY INCREASE/PERFORMANCE AWARDS

In initiating a salary increase, managers are reminded that no commitments, promises or inferences should be made regarding a forthcoming or pending salary increase until the G-565 has been fully approved and an updated G-565 is returned to the Manager. It is very important that each salary increase is audited for conformance to existing policy and bears full management approval before a firm salary commitment is made.

VI. SALARY RANGES

In order to properly administer our salary administration program, it is necessary that all salaried positions be described and evaluated. It is imperative that detailed Position Descriptions be submitted to Salaried Compensation for all new and revised positions. No promotional or merit increases will be process for salaried associates without an assigned salary range.

VII. INCENTIVE COMPENSATION PLANS

New or revised incentive compensation plans, including bonuses and commissions, will be routed to the Executive Compensation Department for evaluation and approval.

1996 CORPORATE COMPENSATION PLAN
Summary of SC-61 Letter

I. **Developmental Increases (DI)** – Associates approved for Developmental Assignment as part of a long term career development plan.
- Up to 10% of base salary
- Moves may be lateral or downward
- Approval by VP Human Resources Planning, Development & Organization

II. **Performance Increases** – Not to exceed salary range maximum

A. **Individual Performance Award (IP)**
- Up to 5% base salary or Lump Sum (PI)
- Interval minimum: 12 months
  Departmental average: Exempt – not less than 14 months
  (Not incl. TP) Non-exempt – not less than 16 months
- Allocation 1.7% of 12/31/95 Base Salaries

B. **Top Performance Award (TP)**
- Up to 5% Base Salary or Lump Sum (TL)
- Used in conjunction with IP – equal amounts/same date and interval
- May receive a second TP (no match from IP) after 6 months
- Allocation 0.8% of 12/31/95 Base Salaries to Function/Business Unit Leaders
- Must be approved by appropriate function/ Business Unit leader (or approved designee)

III. **Promotional Increases** – Not to exceed salary range maximum
- Increase of one or more salary grades (except move through job family)
- Up to 15% increase – or to range minimum if greater
- If move up is 2 or more levels, up to additional 5% increase may be granted

IV. **Associate Performance Plan** – Lump Sum payout based on Performance

- At 100% target 2.5% of 1996 base salary
- Actual payout 0% to 150% (3.75%) of target based on 1996 results

ATTACHMENT 1

SALARIED PERFORMANCE AWARD PLANNING DOCUMENT
(Year Beginning _____ & Ending _____)

Dept: _____
Location: _____
Date: _____

							PROPOSED PERFORMANCE AWARD PLAN			
NAME	CLASSIFI-CATION	SALARY RANGE MIN MID MAX	PRESENT SALARY	DATE LAST INCR	* PERF RANK	EFFECT DATE	IPA -or- TPA	%	AMOUNT

* High to Low

Prepared By: _____
Reviewed By: _____

Total IPA Allocation $_____
TPA Allocation Req.d/Appr'd $_____

[Note: left-hand side of form is partially obliterated]

CHARGE QUESTIONNAIRE

EEOC [obliterated] Only **Name (Intake Officer)**
130982853
824 OMC

[obliterated] answer the following questions, telling us briefly why you believe you have been discriminated against in employment. An officer of the [obliterated] will talk with you after you complete this form.

Date of Birth 4-14-38
Social Security Number 442 - 48 - 6096

LILLY M LEDBETTER
(First) (Middle Name or Initial) (Last)
DATE 3/25/98

P O BOX 742 **TELEPHONE NO.** 256-435/6757
JACKSONVILLE **STATE** AL **ZIP** 36235
COUNTY CALHOUN

[obliterated] provide the name of an individual at a different address in your local area who would know how to reach you.

PHILLIP LEDBETTER **RELATIONSHIP** SON
PO BOX 2403 **CITY** ANNISTON **STATE** AL
ZIP 36202
PHONE 256-237-6601
237-7001

[obliterated] ve I was discriminated against by: (check those that apply)
☒ **EMPLOYER** ☐ **UNION (Give Local No.)**
☐ **EMPLOYMENT AGENCY** ☐ **OTHER (Specify)**
[obliterated] NO. EMPLOYED BY
[obliterated] MPLOYER 2000-LOCAL

GOODYEAR TIRE & RUBBER CO.
922 E. MEIGHAN BLVD
GADSDEN
AL 35999

[obliterated] "Employer" above, are you now employed by the Employer that you believe discriminated against you?
From 2/05/79
(date)

TECH. ENGINEER
(current position)

What action was taken against you that you believe to be discriminatory? What harm, if any, was caused to you or others in your work situation as a result of that action? (If more space is required, use reverse.)

[obliterated] TRANSFERRED TO TECH. ENG. (QUALITY) FROM PRODUCTION AREA MANAGER 2ND WEEK ON JOB MISSED WRONG SPEC. PROVIDED FOR CODE CHANGE WHICH RESULTED IN SOME SCRAP GOODYEAR MADE DECISION TO LAY-OFF MYSELF, AREA MANAGER W. SCOTT AND UNION SET-UP J. SMITH. THERE WERE 133 TIRE HOLDS-RESULTING IN SCRAP IN 1997 – NO LAY-OFFS. W. SCOTT IS A BLACK MAN & I AM A WHITE FEMALE THEY ARE MAKING AN EXAMPLE OF. EXAMPLES 3/5/97 – R. ARTLEDGE TURNED POWER OFF RESULT-300+ SCRAP AND COULD HAVE KILLED SOMEONE **[obliterated]**EED OF 3/9-3/14 – J. SHEARS MADE WRONG SET UP.

WHAT WAS THE MOST RECENT DATE THE HARM YOU ALLEGED TOOK PLACE? _____

Reverse side of Form 283 (Test 10/94)

Why do you believe this action was taken against you?

Goodyear Representative told me last Oct. (1997) that they did not want me and that I was not getting job done. I ask for production record comparison of my crew vs my peers but they could not provide them. Later they advised me I needed to transfer to Tech. Dept. & sent me for interview. They trained me—if putting me with an individual that was told in his [illegible] if they could lay someone off it would be him. The procedure on checking specs wasn't covered in training. They action of bring only one (and W. Scott) being laid off which all the "Good Ol White Boys" Have Not been laid off. I ask to treat me the same as the others involved in tire holds.

Normally, your identity as a complainant will be disclosed to the organization which allegedly discriminated against you. Do you ☒ consent or ☐ not consent to such disclosures?

Have you sought assistance about the action you think was discriminatory from any agent, from your union, an attorney, or from any other source?

☒ No ☐ Yes (If answer is yes, complete below.)

Have you filed a complaint about the action you think was discriminatory with any other Federal, State, or Local Government anti-discrmination agency?

☒ No ☐ Yes (If answer is yes, complete below.)

Have you filed an EEOC charge in the past?

☐ No ☒ Yes (If answer is yes, complete below.)

APPROX. DATE FILED	**ORGANIZATION CHARGED**
JAN 1983	GOODYEAR

CHARGE NUMBER (IF KNOWN)

042-82-1553

I declare under penalty of perjury that the foregoing is true and correct.

SIGNATURE /s/ Lilly M. Ledbetter **DATE** 3/25/98

EEOC FORM 5 (Rev. 06/92)

CHARGE OF DISCRIMINATION

AGENCY	**CHARGE NUMBER**
☐ **FEPA**	130982853
☒ **EEOC**	

NAME	**HOME TELEPHONE**
Mrs. Lilly M. Ledbetter	(256) ??5-6757

STREET ADDRESS **CITY, STATE AND ZIP CODE**
Po Box 742, Jacksonville, AL 36265

DATE OF BIRTH
04/14/38

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME ***(If more than one list below.)***

NAME	**NUMBER OF EMPLOYEES, MEMBERS**
Goodyear Tire & Rubber Company	Cat A (15-100)

TELEPHONE
(256) 549-2250

STREET ADDRESS **CITY, STATE AND ZIP CODE**
922 E. Meigham Blvd, Gadsden, AL 35999

COUNTY
055

NAME	**TELEPHONE NUMBER**
Goodyear Tire & Rubber Company	(216) 796-2121

STREET ADDRESS **CITY, STATE AND ZIP CODE**
1144 East Market Street Akron, Ohio 44309

COUNTY

CAUSE OF DISCRIMINATION BASED ON (Check appropriate box(es))

☐ **RACE** ☐ **COLOR** ☒ **SEX** ☐ **RELIGION**
☐ **RETALIATION** ☒ **AGE** ☐ **DISABILITY**
☐ **OTHER** ***(Specify)***

DATE DISCRMINATION TOOK PLACE

EARLIEST	***LATEST***
01/05/98	07/20/98

☒ **CONTINUING ACTION**

THE PARTICULARS ARE ***(If additional space is needed, attach extra sheet(s)):***

On July 20, 1998 I was suspended from my position as technical engineer for three days due to an error that was placed in the computer by an area manger, and was passed on to me to act upon it. I was transferred involuntarily from an area manager's position on January 5, 1998, to the position as technical engineer. At the time that I was transferred, I learned that the male area managers were earning a higher salary than me. I am also being paid less wages than similarly situated technical engineers who are males. On a continuous basis, I have been subjected to adverse terms and conditions of employment, in that since my transfer, my male co-workers have made comments to me that I am a trouble maker and they have to watch out for me. Younger male employees who have made errors and cost the company economically, have not been suspended as I presently have been. I was given four weeks training by three male employees, only on the job duties that they performed during their shifts. I was not given a job description nor a training manual for the technical engineer position. The on-the-job training that I received was far short of being comprehensive.

I was informed by Ross Hotz, TTL Final Finish, that I had made a terrible error and that I had to be laid off for three days. I inquired why, when others have made errors and

nothing happened to them. Mr. Hotz stated that they have not been consistent in the way they discipline, but that he was trying to start making it consistent.

** Text Continued on Attached Sheet(s) **

☐ **I want this charge filed with both the EEOC and the State or local agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures.**
I declare under penalty of perjury that the foregoing is true and correct.

7/21/98 /s/ Lilly M. Ledbetter
Date **Charging Party *(Signature)***

Jul 21 11:30 1998 CP Initials _____
Chg # 130982853, Attachment Page

Equal Employment Opportunity Commission
Form 5 – Charge of Discrimination,
Additional Text

I believe that I have been discriminated against because of my sex, female, and age/60, in violation of Title VII of the Civil Rights Act of 1964, as amended and the Age Discrimination in Employment Act of 1967, as amended, in that similarly situated younger male employees were treated favorably as compared to me.

Charge orginally [sic] on March 25, 1998

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AREA MANAGER BASE SALARY COMPARISON CHART
(Excluding Overtime)

LILLY LEDBETTER		TERRY AMBERSON		DAVID BARNES	
Date:	**Base Salary:**	**Date:**	**Base Salary:**	**Date:**	**Base Salary:**
4/1/79	$16,760.52	4/1/79	$16,760.52	4/1/79	$16,760.52
4/16/79	17,842.56	4/16/79	17,842.56	4/16/79	17,842.56
10/1/79	18,216.96	7/1/79	18,216.96	7/1/79	18,216.96
10/1/79	18,633.00	10/1/79	18,633.00	10/1/79	18,633.00
11/1/98	44,724.00	7/1/98	59,028.00	9/1/98	55,679.16
(Last day worked)		4/1/99	60,816.00	4/1/99	58,463.16
		4/1/99	64,944.00	4/1/99	61,247.16
		5/1/99	67,541.52	5/1/01	63,383.16
		5/1/02	69,221.52		

DONALD MYERS		JERRY THOMPSON		JIMMY TODD	
Date:	**Base Salary:**	**Date:**	**Base Salary:**	**Date:**	**Base Salary:**
4/1/79	$16,760.52	4/1/79	$16,760.52	4/1/79	$16,760.52
4/16/79	17,842.56	4/16/79	17,842.56	4/16/79	17,842.56
7/1/79	18,216.96	7/1/79	18,216.96	7/1/79	18,216.96
10/1/79	18,633.00	10/1/79	18,633.00	10/1/79	18,633.00
11/1/98	57,696.00	5/1/98	58,266.88	9/1/00	58,464.00
1/1/99	66,348.00	4/16/99	60,555.96	5/1/01	60,444.00
		4/16/99	64,049.16	5/1/02	61,656.00
		10/16/00	73,644.00		
		5/1/01	76,956.00		
		5/1/02	78,876.00		

Backpay for Ledbetter from 3/25/96 to Present if she continued working as Area Manager

Comparator: Donald Myers (base rate excluding overtime)

Back Pay		PBack Pay Per Hr	Comparator Per Hour	Back Pay Per Hr	Hrs Wkd Per Day	Back Pay Rate
From	To					
03/25/96	03/31/96	$21.51	$23.47	$1.96	8	$ 62.72
04/01/96	06/30/96	21.51	23.47	1.96	8	1,003.52
07/01/96	09/30/96	21.51	23.47	1.96	8	1,019.20
10/01/96	12/31/96	21.51	23.47	1.96	8	1,019.20
01/01/97	03/31/97	21.51	24.54	3.03	8	1,527.12
04/01/97	06/30/97	21.51	24.54	3.03	8	1,551.36
07/01/97	09/30/97	21.51	24.54	3.03	8	1,575.60
10/01/97	12/31/97	21.51	24.54	3.03	8	1,575.60
01/01/98	03/31/98	21.51	25.22	3.71	8	1,869.84
04/01/98	06/30/98	21.51	25.22	3.71	8	1,899.52
07/01/98	09/30/98	21.51	25.22	3.71	8	1,929.20
10/01/98	11/01/98	21.51	25.22	3.71	8	623.28
11/02/98	12/31/98	0.00	25.22	25.22	8	8,675.68
01/01/99	03/31/99	0.00	31.72	31.72	8	15,986.88
04/01/99	06/30/99	0.00	31.72	31.72	8	16,240.64
07/01/99	09/30/99	0.00	31.72	31.72	8	16,494.40
10/01/99	12/31/99	0.00	31.72	31.72	8	16,494.40
01/01/00	03/31/00	0.00	31.90	31.90	8	16,588.00
04/01/00	06/30/00	0.00	31.90	31.90	8	16,588.00
07/01/00	09/30/00	0.00	31.90	31.90	8	16,588.00
10/01/00	12/31/00	0.00	31.90	31.90	8	16,588.00
01/01/01	03/31/01	0.00	31.90	31.90	8	16,332.80
04/01/01	06/30/01	0.00	31.90	31.90	8	16,588.00
07/01/01	09/30/01	0.00	31.90	31.90	8	16,588.00
10/01/01	12/31/01	0.00	31.90	31.90	8	16,588.00
01/01/02	03/31/02	0.00	31.90	31.90	8	16,077.60
04/01/02	06/30/02	0.00	31.90	31.90	8	16,332.80
07/01/02	09/30/02	0.00	31.90	31.90	8	16,588.00
10/01/02	12/31/02	0.00	31.90	31.90	8	16,588.00
01/01/03	01/21/03	0.00	31.90	31.90	8	3,572.80

Interim Earnings	Accum'd Principal	Int Rate %	NLRB Rate Factor	Interest	Total
$0.00	$ 62.72	9	0.0015	$ 0.09	$ 62.81
0.00	1,066.33	8	0.02	21.33	1,087.66
0.00	2,106.86	9	0.02275	47.93	2,154.79
0.00	3,173.99	9	0.02275	72.21	3,246.20
0.00	4,773.32	9	0.02225	106.21	4,879.53
0.00	6,430.89	9	0.0225	144.69	6,575.58
0.00	8,151.18	9	0.02275	185.44	8,336.62
0.00	9,912.22	9	0.02275	225.50	10,137.72
0.00	12,007.56	9	0.02225	267.17	12,274.73
0.00	14,174.25	8	0.02	283.49	14,457.74
0.00	16,386.94	8	0.02022222	331.38	16,718.32
0.00	17,341.60	8	0.00688889	119.46	17,461.06
0.00	26,136.74	8	0.01311111	342.68	26,479.42
0.00	42,466.30	7	0.01730556	734.90	43,201.21
0.00	59,441.85	8	0.02	1,188.84	60,630.68
0.00	77,125.08	8	0.02022222	1,559.64	78,684.72
0.00	95,179.12	8	0.02022222	1,924.73	97,103.86
0.00	113,691.86	8	0.02	2,273.84	115,965.69
0.00	132,553.69	9	0.0225	2,982.46	135,536.15
0.00	152,124.15	9	0.02275	3,460.82	155,584.98
0.00	172,172.98	9	0.02275	3,916.94	176,089.91
209.63	192,213.08	9	0.02225	4,276.74	196,489.82
209.63	212,868.19	8	0.02	4,257.36	217,125.56
209.63	233,503.93	7	0.01769444	4,131.72	237,635.65
209.63	254,014.02	7	0.01769444	4,494.64	258,508.66
692.30	273,893.96	6	0.01483333	4,062.76	277,956.72
692.30	293,597.22	6	0.015	4,403.96	298,001.18
692.30	313,896.88	6	0.01516667	4,760.77	318,657.64
692.30	334,553.34	6	0.01516667	5,074.06	339,627.40
0.00	343,200.20	5	0.00277778	953.33	344,153.54

A This Backpay Chart covers the time period from March 25, 1996 through November 1, 1998 and represents base pay rates with interest accruing through January 21, 2003.

B National Labor Relations Board Guidelines were followed in compounding interest on the accumulated quarterly basis principle, *Darnell v. City of Jasper, Alabama*, 730 F.2d 653 (11th Cir. 1994).

C IRS prime rate of interest used for applicable time periods as promulgated by the National Labor Relations Board pursuant to *EEOC v. Guardian Pools, Inc.*, 828 F.2d 1507, 1512 (11th Cir. 1987).

Interest rates are calculated based upon the "short term Federal rate" i.e. the rate assessed by the Internal Revenue Service on the underpayment of taxes, as published by the NLRB in Memorandum GC 97-7.

Interest rates are compounded on a quarterly basis as provided for in *Darnell v. City of Jasper*, 730 F.2d 653 (11th Cir. 1984).

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Backpay for Ledbetter from 3/25/96 to Present if she continued working as Area Manager

Comparator: Jimmy Todd (base rate excluding overtime)

Back Pay		PBack Pay Per Hr	Comparator Per Hour	Back Pay Per Hr	Hrs Wkd Per Day	Back Pay Rate
From	To					
03/25/96	03/31/96	$21.51	$26.90	$5.39	8	$ 172.48
04/01/96	06/30/96	21.51	26.90	5.39	8	2,759.68
07/01/96	09/30/96	21.51	26.90	5.39	8	2,802.80
10/01/96	12/31/96	21.51	26.90	5.39	8	2,802.80
01/01/97	03/31/97	21.51	26.90	5.39	8	2,716.56
04/01/97	06/30/97	21.51	26.90	5.39	8	2,759.68
07/01/97	09/30/97	21.51	26.90	5.39	8	2,802.80
10/01/97	12/31/97	21.51	26.90	5.39	8	2,802.80
01/01/98	03/31/98	21.51	26.90	5.39	8	2,716.56
04/01/98	06/30/98	21.51	26.90	5.39	8	2,759.68
07/01/98	09/30/98	21.51	26.90	5.39	8	2,802.80
10/01/98	11/01/98	21.51	26.90	5.39	8	905.52
11/02/98	12/31/98	0.00	26.90	26.90	8	9,253.60
01/01/99	03/31/99	0.00	26.90	26.90	8	13,557.60
04/01/99	06/30/99	0.00	26.90	26.90	8	13,772.80
07/01/99	09/30/99	0.00	26.90	26.90	8	13,988.00
10/01/99	12/31/99	0.00	26.90	26.90	8	13,988.00
01/01/00	03/31/00	0.00	27.45	27.45	8	14,274.00
04/01/00	06/30/00	0.00	27.45	27.45	8	14,274.00
07/01/00	09/30/00	0.00	27.45	27.45	8	14,274.00
10/01/00	12/31/00	0.00	27.45	27.45	8	14,274.00
01/01/01	03/31/01	0.00	28.74	28.74	8	14,714.88
04/01/01	06/30/01	0.00	28.74	28.74	8	14,944.80
07/01/01	09/30/01	0.00	28.74	28.74	8	14,944.80
10/01/01	12/31/01	0.00	28.74	28.74	8	14,944.80
01/01/02	03/31/02	0.00	29.45	29.45	8	14,842.80
04/01/02	06/30/02	0.00	29.45	29.45	8	15,078.40
07/01/02	09/30/02	0.00	29.45	29.45	8	15,314.00
10/01/02	12/31/02	0.00	29.45	29.45	8	15,314.00
01/01/03	01/21/03	0.00	29.45	29.45	8	3,298.40

Interim Earnings	Accum'd Principal	Int Rate %	NLRB Rate Factor	Interest	Total
$0.00	$ 172.48	9	0.0015	$ 0.26	$ 172.74
0.00	2,932.42	8	0.02	58.65	2,991.07
0.00	5,793.87	9	0.02275	131.81	5,925.68
0.00	8,728.48	9	0.02275	198.57	8,927.05
0.00	11,643.61	9	0.02225	259.07	11,902.68
0.00	14,662.36	9	0.0225	329.90	14,992.26
0.00	17,795.06	9	0.02275	404.84	18,199.90
0.00	21,002.70	9	0.02275	477.81	21,480.51
0.00	24,197.07	9	0.02225	538.38	24,735.46
0.00	27,495.14	8	0.02	549.90	28,045.04
0.00	30,847.84	8	0.02022222	623.81	31,471.65
0.00	32,377.17	8	0.00688889	223.04	32,600.22
0.00	41,853.82	8	0.01311111	548.75	42,402.57
0.00	55,960.17	7	0.01730556	968.42	56,928.59
0.00	70,701.39	8	0.02	1,414.03	72,115.41
0.00	86,103.41	8	0.02022222	1,741.20	87,844.62
0.00	101,832.62	8	0.02022222	2,059.28	103,891.90
0.00	118,165.90	8	0.02	2,363.32	120,529.22
0.00	134,803.22	9	0.0225	3,033.07	137,836.29
0.00	152,110.29	9	0.02275	3,460.51	155,570.80
0.00	169,844.80	9	0.02275	3,863.97	173,708.77
209.63	188,214.02	9	0.02225	4,187.76	192,401.78
209.63	207,136.95	8	0.02	4,142.74	211,279.69
209.63	226,014.86	7	0.01769444	3,999.21	230,014.07
209.63	244,749.24	7	0.01769444	4,330.70	249,079.94
692.30	263,230.44	6	0.01483333	3,904.58	267,135.02
692.30	281,521.12	6	0.015	4,222.82	285,743.94
692.30	300,365.64	6	0.01516667	4,555.55	304,921.18
692.30	319,542.88	6	0.01516667	4,846.40	324,389.29
0.00	327,687.69	5	0.00277778	910.24	328,597.93

A This Backpay Chart covers the time period from March 25, 1996 through November 1, 1998 and represents base pay rates with interest accruing through January 21, 2003.

B National Labor Relations Board Guidelines were followed in compounding interest on the accumulated quarterly basis principle, *Darnell v. City of Jasper, Alabama*, 730 F.2d 653 (11th Cir. 1994).

C IRS prime rate of interest used for applicable time periods as promulgated by the National Labor Relations Board pursuant to *EEOC v. Guardian Pools, Inc.*, 828 F.2d 1507, 1512 (11th Cir. 1987).

Interest rates are calculated based upon the "short term Federal rate" i.e. the rate assessed by the Internal Revenue Service on the underpayment of taxes, as published by the NLRB in Memorandum GC 97-7.

Interest rates are compounded on a quarterly basis as provided for in *Darnell v. City of Jasper*, 730 F.2d 653 (11th Cir. 1984).

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Backpay for Ledbetter from 3/25/96 to Present had she continued working as Technology Engineer
Comparator: Donald Myers (base rate excluding overtime)

Back Pay		PBack Pay Per Hr	Comparator Per Hour	Back Pay Per Hr	Hrs Wkd Per Day	Back Pay Rate
From	To					
03/25/96	03/31/96	$21.51	$23.47	$1.96	8	$ 62.72
04/01/96	06/30/96	21.51	23.47	1.96	8	1,003.52
07/01/96	09/30/96	21.51	23.47	1.96	8	1,019.20
10/01/96	12/31/96	21.51	23.47	1.96	8	1,019.20
01/01/97	03/31/97	21.51	24.54	3.03	8	1,527.12
04/01/97	06/30/97	21.51	24.54	3.03	8	1,551.36
07/01/97	09/30/97	21.51	24.54	3.03	8	1,575.60
10/01/97	12/31/97	21.51	24.54	3.03	8	1,575.60
01/01/98	03/31/98	21.51	25.22	3.71	8	1,869.84
04/01/98	06/30/98	21.51	25.22	3.71	8	1,899.52
07/01/98	09/30/98	21.51	25.22	3.71	8	1,929.20
10/01/98	11/01/98	21.51	25.22	3.71	8	623.28
11/02/98	12/31/98	21.51	25.22	3.71	8	1,276.24
01/01/99	03/31/99	21.51	31.72	10.21	8	5,145.84
04/01/99	06/30/99	21.51	31.72	10.21	8	5,227.52
07/01/99	09/30/99	21.51	31.72	10.21	8	5,209.20
10/01/99	12/31/99	21.51	31.72	10.21	8	5,309.20
01/01/00	03/31/00	21.51	31.90	10.39	8	5,402.80
04/01/00	06/30/00	21.51	31.90	10.39	8	5,402.80
07/01/00	09/30/00	21.51	31.90	10.39	8	5,402.80
10/01/00	12/31/00	21.51	31.90	10.39	8	5,402.80
01/01/01	03/31/01	21.51	31.90	10.39	8	5,319.68
04/01/01	06/30/01	21.51	31.90	10.39	8	5,402.80
07/01/01	09/30/01	21.51	31.90	10.39	8	5,402.80
10/01/01	12/31/01	21.51	31.90	10.39	8	5,402.80
01/01/02	03/31/02	21.51	31.90	10.39	8	5,236.56
04/01/02	06/30/02	21.51	31.90	10.39	8	5,319.68
07/01/02	09/30/02	21.51	31.90	10.39	8	5,402.80
10/01/02	12/31/02	21.51	31.90	10.39	8	5,402.80
01/01/03	01/21/03	21.51	31.90	10.39	8	1,163.68

Interim Earnings	Accum'd Principal	Int Rate %	NLRB Rate Factor	Interest	Total
$0.00	$ 62.72	9	0.0015	$ 0.09	$ 62.81
0.00	1,066.33	8	0.02	21.33	1,087.66
0.00	2,106.86	9	0.02275	47.93	2,154.79
0.00	3,173.99	9	0.02275	72.21	3,246.20
0.00	4,773.32	9	0.02225	106.21	4,879.53
0.00	6,430.89	9	0.0225	144.69	6,575.58
0.00	8,151.18	9	0.02275	185.44	8,336.62
0.00	9,912.22	9	0.02275	225.50	10,137.72
0.00	12,007.56	9	0.02225	267.17	12,274.73
0.00	14,174.25	8	0.02	283.49	14,457.74
0.00	16,386.94	8	0.02022222	331.38	16,718.32
0.00	17,341.60	8	0.00688889	119.46	17,461.06
0.00	18,737.30	8	0.01311111	245.67	18,982.97
0.00	24,128.81	7	0.01730556	417.56	24,546.37
0.00	29,773.89	8	0.02	595.48	30,369.37
0.00	35,678.57	8	0.02022222	721.50	36,400.07
0.00	41,709.27	8	0.02022222	843.45	42,552.72
0.00	47,955.52	8	0.02	959.11	48,914.63
0.00	54,317.43	9	0.0225	1,222.14	55,539.58
0.00	60,942.38	9	0.02275	1,386.44	62,328.81
0.00	67,731.61	9	0.02275	1,540.89	69,272.51
0.00	74,592.19	9	0.02225	1,659.68	76,251.87
0.00	81,654.67	8	0.02	1,633.09	83,287.76
0.00	88,690.56	7	0.01769444	1,569.33	90,259.89
0.00	95,662.69	7	0.01769444	1,692.70	97,355.39
0.00	102,591.95	6	0.01483333	1,521.78	104,113.73
0.00	109,433.41	6	0.015	1,641.50	111,074.91
0.00	116,477.71	6	0.01516667	1,766.58	118,244.29
0.00	123,647.09	6	0.01516667	1,875.31	125,522.40
0.00	126,686.08	5	0.00277778	351.91	127,037.99

A This Backpay Chart covers the time period from March 25, 1996 through November 1, 1998 and represents base pay rates with interest accruing through January 21, 2003.

B National Labor Relations Board Guidelines were followed in compounding interest on the accumulated quarterly basis principle, *Darnell v. City of Jasper, Alabama*, 730 F.2d 653 (11th Cir. 1994).

C IRS prime rate of interest used for applicable time periods as promulgated by the National Labor Relations Board pursuant to *EEOC v. Guardian Pools, Inc.*, 828 F.2d 1507, 1512 (11th Cir. 1987).

Interest rates are calculated based upon the "short term Federal rate" i.e. the rate assessed by the Internal Revenue Service on the underpayment of taxes, as published by the NLRB in Memorandum GC 97-7.

Interest rates are compounded on a quarterly basis as provided for in *Darnell v. City of Jasper*, 730 F.2d 653 (11th Cir. 1984).

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Backpay for Ledbetter from 3/25/96 to Present if she continued working as a Technology Engineer

Comparator: Jimmy Todd (base rate excluding overtime)

Back Pay		PBack Pay Per Hr	Comparator Per Hour	Back Pay Per Hr	Hrs Wkd Per Day	Back Pay Rate
From	To					
03/25/96	03/31/96	$21.51	$26.90	$5.39	8	$ 172.48
04/01/96	06/30/96	21.51	26.90	5.39	8	2,759.68
07/01/96	09/30/96	21.51	26.90	5.39	8	2,802.80
10/01/96	12/31/96	21.51	26.90	5.39	8	2,802.80
01/01/97	03/31/97	21.51	26.90	5.39	8	2,716.56
04/01/97	06/30/97	21.51	26.90	5.39	8	2,759.68
07/01/97	09/30/97	21.51	26.90	5.39	8	2,802.80
10/01/97	12/31/97	21.51	26.90	5.39	8	2,802.80
01/01/98	03/31/98	21.51	26.90	5.39	8	2,716.56
04/01/98	06/30/98	21.51	26.90	5.39	8	2,759.68
07/01/98	09/30/98	21.51	26.90	5.39	8	2,802.80
10/01/98	11/01/98	21.51	26.90	5.39	8	905.52
11/02/98	12/31/98	21.51	26.90	5.39	8	1,854.16
01/01/99	03/31/99	21.51	26.90	5.39	8	2,716.56
04/01/99	06/30/99	21.51	26.90	5.39	8	2,759.68
07/01/99	09/30/99	21.51	26.90	5.39	8	2,802.80
10/01/99	12/31/99	21.51	26.90	5.39	8	2,802.80
01/01/00	03/31/00	21.51	27.45	5.94	8	3,088.80
04/01/00	06/30/00	21.51	27.45	5.94	8	3,088.80
07/01/00	09/30/00	21.51	27.45	5.94	8	3,088.80
10/01/00	12/31/00	21.51	27.45	5.94	8	3,088.80
01/01/01	03/31/01	21.51	28.74	7.23	8	3,701.76
04/01/01	06/30/01	21.51	28.74	7.23	8	3,759.60
07/01/01	09/30/01	21.51	28.74	7.23	8	3,759.60
10/01/01	12/31/01	21.51	28.74	7.23	8	3,759.60
01/01/02	03/31/02	21.51	29.45	7.94	8	4,001.76
04/01/02	06/30/02	21.51	29.45	7.94	8	4,065.28
07/01/02	09/30/02	21.51	29.45	7.94	8	4,128.80
10/01/02	12/31/02	21.51	29.45	7.94	8	4,128.80
01/01/03	01/21/03	21.51	29.45	7.94	8	889.28

Interim Earnings	Accum'd Principal	Int Rate %	NLRB Rate Factor	Interest	Total
$0.00	$ 172.48	9	0.0015	$ 0.26	$ 172.74
0.00	2,932.42	8	0.02	58.65	2,991.07
0.00	5,793.87	9	0.02275	131.81	5,925.68
0.00	8,728.48	9	0.02275	198.57	8,927.05
0.00	11,643.61	9	0.02225	259.07	11,902.68
0.00	14,662.36	9	0.0225	329.90	14,992.26
0.00	17,795.06	9	0.02275	404.84	18,199.90
0.00	21,002.70	9	0.02275	477.81	21,480.51
0.00	24,197.07	9	0.02225	538.38	24,735.46
0.00	27,495.14	8	0.02	549.90	28,045.04
0.00	30,847.84	8	0.02022222	623.81	31,471.65
0.00	32,377.17	8	0.00688889	223.04	32,600.22
0.00	34,454.38	8	0.01311111	451.74	34,906.11
0.00	37,622.67	7	0.01730556	651.08	38,273.75
0.00	41,033.43	8	0.02	820.67	41,854.10
0.00	44,656.90	8	0.02022222	903.06	45,559.96
0.00	48,362.76	8	0.02022222	978.00	49,340.76
0.00	52,429.56	8	0.02	1,048.59	53,478.16
0.00	56,566.96	9	0.0225	1,272.76	57,839.71
0.00	60,928.51	9	0.02275	1,386.12	62,314.64
0.00	65,403.44	9	0.02275	1,487.93	66,891.36
0.00	70,593.12	9	0.02225	1,570.70	72,163.82
0.00	75,923.42	8	0.02	1,518.47	77,441.89
0.00	81,201.49	7	0.01769444	1,436.82	82,638.30
0.00	86,397.90	7	0.01769444	1,528.76	87,926.67
0.00	91,928.43	6	0.01483333	1,363.61	93,292.03
0.00	97,357.31	6	0.015	1,460.36	98,817.67
0.00	102,946.47	6	0.01516667	1,561.35	104,507.83
0.00	108,636.63	6	0.01516667	1,647.66	110,284.28
0.00	111,173.56	5	0.00277778	308.82	111,482.38

A This Backpay Chart covers the time period from March 25, 1996 through January 21, 2003 and represents base pay rates with interest accruing through January 21, 2003.

B National Labor Relations Board Guidelines were followed in compounding interest on the accumulated quarterly basis principle, *Darnell v. City of Jasper, Alabama*, 730 F.2d 653 (11th Cir. 1994).

C IRS prime rate of interest used for applicable time periods as promulgated by the National Labor Relations Board pursuant to *EEOC v. Guardian Pools, Inc.*, 828 F.2d 1507, 1512 (11th Cir. 1987).

Interest rates are calculated based upon the "short term Federal rate" i.e. the rate assessed by the Internal Revenue Service on the underpayment of taxes, as published by the NLRB in Memorandum GC 97-7.

Interest rates are compounded on a quarterly basis as provided for in *Darnell v. City of Jasper*, 730 F.2d 653 (11th Cir. 1984).

09/29/98 GOODYEAR EMPLOYEE MANAGEMENT SYSTEM PAGE: 001
10:27:29 ** EMPLOYEE PROFILE ** FROM: 01/01

EMPLOYEE: LEDBETTER, LILLY M EMPLOYEE NUMBER: 422-48-6096

=== CURRENT INFORMATION ===

PO BOX 742 DOB: 04/14/38 DOD: SEX: F AGE:
JACKSONVILLE AL 36265 CSD: 02/05/79 PSD: 02/05/79 JSD: 08/01/9
RACE: WHITE HNCP: NOT DISABLED
VET: NO MILITARY CIT: U S CITIZEN

STATUS: A ACTIVE EMPCC: FS FULL TIME SALARIED GRADE: E03 UNREP:

POS: 46002272504 TITLE: TECHNOLOGY ENGINEER FLSA: 2

DEPT: 5040 LOCN: GT131 MIN: 3,075 MID: 4,150 MAX: 5,225

ORG1: PRODUCT SUPPLY ORG2: NORTH AMERICAN TIRE ORG3: GTR GADSDEN PLT

BASRT: 3,727.0000 PYRCD: 10011 PAY FREQ: S BASE FREQ: M MERIT BUDGET: 001

=== EDUCATION ===

HIGH SCHOOL GRADUATE

=== JOB/SALARY ===

AS OF	BASE RATE	LOCATION	DEPT	TITLE	TYP	GRADE	EEO
08/01/98	3,727.0000	GTR GADSDE	5040	TECHNOLOGY ENGINEER	TC	E03	B
07/20/98	3,727.0000	GTR GADSDE	5510	AREA MGR-PRODCTN/MAI	RS	E04	A
05/05/98	2,608.9000	GTR GADSDE	5510	AREA MGR-PRODCTN/MAI	PP	E04	A
03/05/98	3,727.0000	GTR GADSDE	5510	AREA MGR-PRODCTN/MAI	LA	E04	A
09/01/97	3,727.0000	GTR GADSDE	5510	AREA MGR-PRODCTN/MAI	DC	E04	A
01/01/97	3,727.0000	GTR GADSDE	5520	AREA MGR-PRODCTN/MAI	IC	E04	A
12/16/96	3,727.0000	GTR GADSDE	5520	AREA MGR-PRODCTN/MAI	RS	E04	A
11/09/96	3,727.0000	GTR GADSDE	5520	AREA MGR-PRODCTN/MAI	LA	E04	A
12/01/95	3,727.0000	GTR GADSDE	5510	AREA MGR-PRODCTN/MAI	TP	E04	A
12/01/95	3,589.0000	GTR GADSDE	5520	AREA MGR-PRODCTN/MAI	IP	381	A
02/01/95	3,451.0000	GTR GADSDE	5520	AREA MGR-PRODCTN/MAI	IC	381	A
10/01/94	3,451.0000	GTR GADSDE	5520	AREA MGR-PRODCTN/MAI	ME	381	A
04/01/94	3,288.0000	GTR GADSDE	5520	AREA MGR-PRODCTN/MAI	IC	381	A
01/01/94	3,288.0000	GTR GADSDE	5520	AREA MGR-PRODCTN/MAI	SC	381	A
04/01/93	3,288.0000	GTR GADSDE	5520	AREA MGR-PRODCTN/MAI	ME	381	A
04/01/92	3,123.0000	GTR GADSDE	5520	AREA MGR-PRODCTN/MAI	ME	381	A
02/10/92	2,928.0000	GTR GADSDE	5520	AREA MGR-PRODCTN/MAI	DC	381	A
11/01/91	2,928.0000	GTR GADSDE	5560	AREA MGR-PRODCTN/MAI	RO	381	A
03/16/91	2,928.0000	GTR GADSDE	5560	AREA MGR-PRODCTN/MAI	ME	381	A
02/19/90	2,687.0000	GTR GADSDE	5560	AREA MGR-PRODCTN/MAI	TR	381	A
11/27/89	2,687.0000	GTR GADSDE	5430	AREA MGR-PRODCTN/MAI	TR	381	A

09/26/89	2,687.0000	GTR GADSDE	5040	AREA MGR-PRODCTN/MAI	RC	381	A
09/25/89	2,687.0000	GTR GADSDE	5040	AREA MGR-PRODCTN/MAI	RC	381	A
09/01/89	2,687.0000	GTR AKR CO	995	AREA MGR-PRODCTN/MAI	RO	381	A
07/16/89	2,687.0000	GT131	995	AREA MGR-PRODCTN/MAI	LD	381	A
07/15/89	2,687.0000	GT131	995	AREA MGR-PRODCTN/MAI	TR	381	A

EMPLOYEE: LEDBETTER, LILLY M EMPLOYEE NUMBER: 422-48-6096

= = = JOB/SALARY = = =

AS OF	BASE RATE	LOCATION	DEPT	TITLE	TYP	GRADE	EEO
03/01/89	2,687.0000	GT131	1320	AREA MGR-PRODCTN/MAI	ME	381	A
08/17/87	2,535.0000	GT131	132	AREA MGR-PRODCTN/MAI	RC	381	A
12/16/85	2,535.0000	GT131	5500	AREA MGR-PRODCTN/MAI	TR	381	A
11/01/85	2,535.0000	GT131	5500	AREA MGR-PRODCTN/MAI	ME	381	A
09/01/84	2,365.0000	GT131	5500	SPRVSR-PRODCTN REC &	ME	319	A
06/01/83	2,245.0000	GTR GADSDE	5500	SPRVSR-PRODCTN REC &	ME	25	A
02/01/82	2,110.0000	GTR GADSDE	5500	SPRVSR-PRODCTN REC &	ME	25	A
12/07/81	1,960.0200	GTR GADSDE	5500	SPRVSR-PRODCTN REC &	RS	25	A
10/28/81	1,960.0200	GTR GADSDE	5500	SPRVSR-PRODCTN REC &	LA	25	A

10/01/81	1,960.0200	GTR GADSDE	5500	SPRVSR-PRODCTN REC &	GC	25	A
07/01/81	1,918.5200	GT131	5500	SPRVSR-PRODCTN REC &	GC	24	A
04/01/81	1,877.0200	GT131	5500	SPRVSR-PRODCTN REC &	GC	24	A
01/01/81	1,835.5200	GT131	5500	SPRVSR-PRODCTN REC &	GC	24	A
12/01/80	1,794.0200	GT131	5500	SPRVSR-PRODCTN REC &	ME	23	A
10/01/80	1,733.0200	GT131	5500	SPRVSR-PRODCTN REC &	GC	23	A
07/01/80	1,701.8200	GT131	5500	SPRVSR-PRODCTN REC &	GC	23	A
04/16/80	1,641.1500	GT131	5500	SPRVSR-PRODCTN REC &	GC	23	A
04/01/80	1,615.1500	GT131	5500	SPRVSR-PRODCTN REC &	GC	23	A
01/01/80	1,580.4800	GT131	5500	SPRVSR-PRODCTN REC &	GC	23	A
10/16/79	1,552.7500	GT131	5500	SPRVSR-PRODCTN REC &	TR	23	A
10/01/79	1,552.7500	GT900	1053	OUTSIDE PLNT SQD TRAI	GC	0	B
07/01/79	1,518.0800	GT900	1053	OUTSIDE PLNT SQD TRAI	GC	0	B
04/16/79	1,452.2100	GT900	1053	OUTSIDE PLNT SQD TRAI	GI	0	B
04/16/79	1,486.8800	GT900	1053	OUTSIDE PLNT SQD TRAI	GC	0	B
04/01/79	1,396.7100	GT900	1053	OUTSIDE PLNT SQD TRAI	GC	0	B
02/05/79	1,370.7100	GT900	1053	OUTSIDE PLNT SQD TRAI	NH	0	B

=== ATTENDANCE SUMMARY ===

AS OF	DESCRIPTION	ELIG	DEFER	USED	BANKED
01/01/98	VOCATIONAL	352.00	0.00	0.00	0.00
01/01/98	VACATION	160.00	54.00	100.00	0.00

01/01/98	SICK PAY	352.00	0.00	352.00	0.00
01/01/97	VOCATIONAL	352.00	0.00	0.00	0.00
01/01/97	VACATION	160.00	14.00	120.00	0.00
01/01/97	SICK PAY	352.00	0.00	24.00	0.00
01/01/96	VOCATIONAL	352.00	0.00	0.00	0.00
01/01/96	VACATION	160.00	0.00	146.00	0.00
01/01/96	SICK PAY	352.00	0.00	276.00	0.00
01/01/95	VOCATIONAL	352.00	0.00	0.00	0.00
01/01/95	VACATION	160.00	26.00	186.00	0.00
01/01/95	SICK PAY	352.00	0.00	48.00	0.00

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=== TRAINING INFORMATION ===

AS OF	COURSE	COURSE DESCRIPTION
09/09/98	GD6222	BUSINESS CONDUCT
05/04/98	GD7055	ISO 9000 ELEMENT STUDY
02/02/98	GD1018	RADIATION—MISCELLANEOUS
09/15/97	GD1059	PERSONNEL TRANSPORT VEH REVIEW
02/28/97	GD7048	ISO9000 PJ INTERNAL AUDITOR
10/19/96	GD7057	QS9000-CONCEPT & INTERPRET
10/02/96	GD7055	ISO 9000 ELEMENT STUDY
07/15/96	GD7053	ISO PUBLIC VIEW

02/19/93 MFG001 ADVANCED LEADERSHIP SKILLS
05/01/88 MFG004 AREA MANAGER TIRES

09/29/98 GOODYEAR EMPLOYEE MANAGEMENT SYSTEM PAGE: 003
10:27:29 ** EMPLOYEE PROFILE ** FROM: 01/01/

EMPLOYEE: LEDBETTER, LILLY M EMPLOYEE NUMBER: 422-48-6096

= = = TRAINING INFORMATION = = =

AS OF	COURSE	COURSE DESCRIPTION

NO INFORMATION IS CURRENTLY ON FILE

= = = SKILLS BANK PROFILE = = =

CODES	SKILL-DESCRIPTION	YRS-EXP	LAST-YR
SKILL-CODES			
AA145	INVENTORY CONTROL	10	78
AC220	PAPER (INCLUDING FORMS PURCHASING)	10	78
AG120	EMPLOYEE APPRAISAL PLANS	08	78
AH105	CONTRACT INTERPRETATION	08	78

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AJ120	GOVERNMENT REGULATIONS	08	78
AK110	CAPITAL INVESTMENT EQUIPMENT PLANNI	04	78
AK145	MANAGEMENT TRAINING	08	78
AL165	PERFORMANCE MANAGEMENT SYSTEM	08	78
AL105	COLLEGE RELATIONS	06	78
AL110	COUNSELING	07	78
AL120	EMPLOYMENT	08	78
AL155	MOTIVATION TECHNIQUE	06	78
AL175	PERSONNEL PLACEMENT	05	78
AL180	PERSONNEL POLICIES	05	78
AL185	PERSONNEL RECORDS RETENTION / MAINT	06	78
AL190	RECRUITING	06	78
BC325	GOV'T IMPOSED CONSTRAINTS	09	78
BE110	EEO LAWS AND REGULATIONS	06	78
BF190	OSHA PROCEDURES / LAWS	07	78
BF225	SAFETY PROMOTION	06	78
BG235	LABOR LAW	07	78
BG330	FEDERAL REPORTS	08	78
BG370	TAX AND TAXATION LAW	10	78
JF100	QUALITY CONTROL – GENERAL	WE	84
NA120	PASSENGER TIRES	WM	84

MOBILITY-CODES

WD110 WILLING TO RELOCATE IN THE UNITED S

PRIOR-WORK-EXPERIENCE

01/01/76	02/01/79	DISTRICT MANAGER	H & R BLOCK INC.
05/01/74	01/01/76	ASSISTANT TO FINANCIAL AID	JACKSONVILLE STATE UNVIVERS
07/01/73	05/01/74	OFFICE MANAGER-BOOKKEEPER	WOMAN'S CLIMIC PA
12/01/72	06/01/73	ASSISTANT MANAGER	H & R BLOCK INC.
07/01/72	12/01/72	ACCOUNTANT	MORGAN & COPELAND ACCOUNTIN

ACTIVITIES

PRESIDENT AMA ANNISTON 1982-1983
AL PRIVATE SCHOOL LICENSE BRD 79-81
CERTIFICATE OF APPRECIATION 1976

EMPLOYEE: LEDBETTER, LILLY M EMPLOYEE NUMBER: 422-48-6096

= = = SKILLS BANK PROFILE = = =

CODES	SKILL-DESCRIPTION	YRS-EXP	LAST-YR
ACTIVITIES			
	SPECIAL OLYMPICS PROGRAM		
	YMCA VOLUNTEER		
DEVELOPMENT-COURSES			
	PRACTICAL SPEAKING UP&OUT 1 DAY		84
	HIGH TECHNOLOGY-IMPACT ON MGT 2HR		84
	MANAGING EFFECTIVE MEETING 2HRS		84
	PREVENTIVE LABOR RELATIONS 1 DAY		83
	PUBLIC SPEAKING IN LEADERSHIP 2HR		83
	TIME MANAGEMENT 2 HOURS 1983		
	PROD PLANNING & SCHEDULING 4 HRS		83
	PARTICIPATIVE MANAGEMENT 4 HOURS		83

***** END OF DOCUMENT *****

ATTACHMENT I

SALARIED EMPLOYEES

MERIT INCREASE PLANNING

(Year Beginning Jan 93 & Ending Dec 93)

Dept. 5520

Location: GADSDEN

Date: 3-26-93

Name	Classification	Rate Range			Present Salary	Date Last Merit	Perf Grp	Proposed Merit Plan		
		Min	Mid	Max				Effect. Date	Increase %	Increase Amount
R.D. Jones	Area Mgr Prod/Maint	3185	3981	4777	4187.02	3-1-92	1	3-1-93	5.97	250.00
J.S. Thompson	Area Mgr Prod/Maint	3185	3981	4777	4120.00	7-1-92	2	9-1-93	4.85	200.00
W.C. Miller	Area Mgr Prod/Maint	3185	3981	4777	4420.00	9-1-92	2	11-1-93	4.64	205.00
W.G. Bice	Maint. Section Mgr	3040	3800	4560	3813.00	5-1-92	2	7-1-93	4.78	182.00
L.M. Ledbetter	Area Mgr Prod/Maint	3185	3981	4777	3123.00	4-1-92	2	4-1-93	5.28	165.00
J.R. Todd	Area Mgr Prod/Maint	3185	3981	4777	4412.00	6-1-92	3	—	—	0

Prepared By: /s/ M.V. Tucker

Reviewed by: [not signed]

Total Allocation $1,002.00 Expenditure $1,002.00

ATTACHMENT I

SALARIED EMPLOYEES

MERIT INCREASE PLANNING

(Year Beginning Jan 94 & Ending Dec 94)

Dept. 5520

Location: GADSDEN

Date: 3-9-94

Name	Classification	Rate Range			Present Salary	Date Last Merit	Perf Grp	Proposed Merit Plan		
		Min	Mid	Max				Effect. Date	Increase %	Increase Amount
R.D. Jones	Area Mgr Prod/Maint	2967	3857	4747	4437.02	3-1-93	1	5-1-94	6.50	288.00
W.C. Miller	Area Mgr Prod/Maint	2967	3857	4747	4625.00	11-1-93	2	—		
J.S. Thompson	Area Mgr Prod/Maint	2967	3857	4747	4320.00	9-1-93	2	—		
J.R. Todd	Area Mgr Prod/Maint	2967	3857	4747	4412.00	6-1-92	2	2-1-94	5.66	250.00
W.G. Bice	Maint. Section Mgr	2967	3857	4747	3995.00	7-1-93	2	10-1-94	5.10	205.00
L.M. Ledbetter	Area Mgr Prod/Maint	2967	3857	4747	3288.00	4-1-93	3	11-1-94	5.00	163.00

Prepared By: /s/ M.V. Tucker

Reviewed by: /s/ H. Smith

Total Allocation $906.00 Expenditure $906.00

PLANT LOCATION/DEPT: GADSDEN/5500-5510-5520-711
TIRE ASSEMBLY

MERIT BUDGET #:_____

Name	Title	Exempt/ Non-Ex.	Peer Pos.	Present Salary
Amberson, T.R.	Area Mgr	Exempt	18	4595.00
Barnes, D.A.	Area Mgr	Exempt	12	4186.00
Bice, W.G.	Maint Sect Mgr	Exempt	6	4200.00
Burnes, R.L.	~~Sec Fec~~ Coun'l	Non Exempt	7	2200.00
Cheatwood, J.L.	Area Mgr	Exempt	5	4100.00
Dorn, D.R.	Maint. Mgr	Exempt	13	4785.00
Elliott, C.B.	Area Mgr	Exempt	20	4551.00
Gunter, R.D.	Area Mgr	Exempt	14	4141.00
Hicks, W.W.	Area Mgr	Exempt	8	4566.00
Holderfield, V.B.	Prod. Specialist	Exempt	9	5306.00
Jenkins, A.	Maint Sec. Mgr	Exempt	22	3952.00
Jones, R.D.	Area Mgr	Exempt	2	5105.00
Kell, J.A.	Area Mgr	Exempt	11	4582.00
Ledbetter, L.M.	Area Mgr	Exempt	23	3727.00
Maudsley, M.V.	Prod Auditor	Exempt	10	5315.00
Maydall, B.J.	Maint Mgr	Exempt	16	5470.00
McLeod, P.M.	Area Mgr	Exempt	1	4745.00
Miller, W.C.	Area Mgr	Exempt	17	4905.00
Maske, R.J.	Area Mgr	Exempt	3	4435.00
Sitz, P.S.	Area Mgr	Exempt	19	4350.00
Thomas, W.O.	Area Mgr	Exempt	15	4192.00
Todd, J.R.	Area Mgr	Exempt	24	4662.00
Thompson, J.S.	Area Mgr	Exempt	21	4560.00
Welsh, B.F.	Area Mgr	Exempt	4	4840.00
TOTALS				

Range Min	Range Max	Last Incr Date	Last Incr %	Eff Date	IPA %	IPA $	TPA %	TPA $
3265	5549	10-1-95	3.84					
3265	5549	10-1-94	4.23	3-1-96	3.5	145.00		
2903	4935	10-1-94	5.13	3-1-96	2.4	100.00	2.4	100.00
1626	2602	9-1-94	3.53	2-1-96	2.2	50.00	2.2	50.00
3265	5549	10-1-94	5.37	3-1-96	2.4	100.00	2.4	100.00
3702	6292	5-1-95	4.02	10-1-96	3.2	150.00		
3265	5549	4-1-95	4.12					
3265	5549	6-15-95	9.99	11-1-96	3.5	145.00		
3265	5549	12-1-94	3.87	5-1-96	2.2	100.00	2.2	100.00
3265	5549	5-1-95	8.42	9-1-96	3.8	200.00		
2903	4935	5-1-95	4.77					
3265	5549	9-1-95	7.89					
3265	5549	7-1-95	6.21	11-1-96	3.0	145.00		
3265	5549	12-1-95	7.85					
3702	6292	7-1-95	2.09	11-1-96	3.8	200.00		
3702	6292	12-1-95	3.99					
3265	5549	11-1-94	3.26	3-1-96	3.0	140.00	3.0	140.00
3265	5549	4-1-95	5.97					
3265	5549	10-1-94	4.11	3-1-96	2.4	105.00	2.4	105.00
3265	5549	10-1-95	3.57					
3265	5549	12-1-94	4.23	5-1-96	3.2	140.00		
3265	5549	2-1-94	5.67					
3265	5549	4-1-95	5.42					
3265	5549	7-1-95	2.87	11-1-96	2.5	120.00	2.5	120.00
						1		2

Total IPA Allocation – $1,852.00 Total IPA – 1840.00
Total TPA Allocation – $825.00 Total TPA – 715.00
Time Interval exempt – 16 months
Time Interval non exempt – 17 months

/s/ Peter T. Buchanan 4/20/96

Associate Name: Lilly Ledbetter
Performance Review Year: 1997

Major Responsibility: Safety
__Extremely important __ Very Important __Important

PS#1 – Actively involved in the business center safety
1) Does not attend weekly safety meetings in the business center. 2) Fills out safety investigations and finds root cause 3) Needs improvement on monthly safety tours with safety rep. 4) Good reduction in OSHA rates in 1997. 5) Utilizes LOTO/CHE procedures. Should develop a documented audit external to the auditor's audits. [handwritten note: "Bad external audits."]
PS#2 – Effectively manages light duty labor.
1) Utilizes light duty labor effectively
PS#3 – Insures safety and accident investigations are complete and root cause is eliminated.
1) Utilizes crew safety representative to investigate accidents. 2) Investigates all OSHA reportable accidents and finds root cause.
PS#4 – Department adheres to PPE policy and other safety guidelines.
1) Wears personal PPE. 2) Team's compliance during PPE audits is the worst in the department. This needs improvement in 1998.

Associate Comments: _____
_____
_____

Rater Comments:
_____
_____
_____

Overall evaluation of Major Responsibility (Circle One)

5	4	3	2	1
Highly Outstndg Perform.	Good Effec Perform.	Effec Perform.	Needs Improvmnt	Poor Perform.

[Number 1 (Poor Performance) is circled.]

Major Responsibility: Quality and Waste
__Extremely important __ Very Important __Important

PS#1 – Business center Demonstrates continuous improvement in waste.
1) Average cured waste performance for the year. 2) ~~Friction, green and Cured were high relative to the rest of the department and her section.~~ 3) Does an excellent job of filling out necessary scrap tags. 4) Repairs scrap when possible.
PS#2 – Visible on the floor working on waste related issues.
1) Very visible on the floor working on waste. Lilly needs to expect this same effort out of the associates that work for her. 2) Some follow-up on machines that are having waste issues in person. 3) Lacks machine ~~and waste expertise~~. 4) Needs to work more closely with technology associates to reduce waste to the department goals.
PS#3 – Follows QS9000 systems and continually strives to improve quality.
1) Department does daily QS9000 contacts. 2) Followed up and on all QS9000 audit non-conformances and implement corrective action where required.

PS#4 – Holds associates accountable for following procedures and generating scrap.
1) Has to be encouraged to hold people accountable for waste. 2) ~~Needs to improve systems to reduce green and cured scrap follow up.~~ 3) Procedures for ensuring the right stock is loaded need to be audited to find potential problems before there is a tire hold. People should be held accountable before the problem manifests itself as a hold.

Associate Comments: _____

_____

_____

Rater Comments:

_____

_____

_____

Overall evaluation of Major Responsibility (Circle One)

5	4	3	2	1
Highly Outstndg Perform.	Good Effec Perform.	Effec Perform.	Needs Improvmnt	Poor Perform.

[Number 3 (Effective Performance) is circled.]

Major Responsibility: Product delivery and Output per hour
__Extremely important __ Very Important __Important

PS#1 – Achieves production goals.
1) Production goals were not met for 1997. Lilly was tied for the worst production in her section. 2) Improvements are needed in the ARFs. She needs to put ownership of building tires on the builders not herself. 3) Lacks mechanical and electrical knowledge of the machine.

PS#2 – Manages customer losses.
1) Knows what the customer needs and works with the other tire room managers to ensure the correct machines are turboed. 2) Effectively prioritizes turbo machine production to ensure curing losses are minimal.
PS#3 – Manages output per associate hour worked.
1) Her section needs to improve production to reduce hours of overtime worked to support low codes. 2) Needs to better utilize existing associates on housekeeping and other misc. tasks to reduce overtime hours. 3) Improvement needed on engineering utilization to prevent overtime hours worked to due misc. projects.
PS#4 – Maintains equipment
1) Works on the machines when needed. 2) Works with engineering to improve the machines level of operating condition.

Associate Comments: _____

_____

_____

Rater Comments:

_____

_____

_____

Overall evaluation of Major Responsibility (Circle One)

5	4	3	2	1
Highly Outstndg Perform.	Good Effec Perform.	Effec Perform.	Needs Improvmnt	Poor Perform.

[Number 2 (Needs Improvement) is circled.]

Major Responsibility: Housekeeping
__Extremely important __ Very Important __Important

PS#1 – Performs housekeeping tours.
1) In 1998, housekeeping tours need to be performed daily. 2) Improvements in components on the floor, decluttering should be top priority.
PS#2 – Utilizes available labor to improve housekeeping.
1) Utilized light duty labor for cleaning in T/A. 2) Need improvement on utilizing labor on down machines for housekeeping. 3) Need to utilize engineering associates for improving and maintaining the areas.
PS#3 – Maintains outstanding housekeeping in high visibility areas.
1) High visible areas are good.

Associate Comments: _____

_____

_____

Rater Comments:

_____

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_____

Overall evaluation of Major Responsibility (Circle One)

5	4	3	2	1
Highly Outstndg Perform.	Good Effec Perform.	Effec Perform.	Needs Improvmnt	Poor Perform.

[Number 3 (Effective Performance) is circled.]

Major Responsibility: Cost Control

__Extremely important __ Very Important __Important

PS#1 – Manages overtime cost
1) Utilizes G.O.s to fill vacancies 2) Needs to better utilize builders in the area of housekeeping to

prevent overtime for visits. 3) Needs to better utilize craftsmen idle time to do misc. work and bench work.
PS#2 – Holds associates accountable for non-contractual absenteeism.-
1) Holds associates accountable if encouraged.

Associate Comments: _____

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_____

Rater Comments:

_____

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_____

Overall evaluation of Major Responsibility (Circle One)

5	4	3	2	1
Highly Outstndg Perform.	Good Effec Perform.	Effec Perform.	Needs Improvmnt	Poor Perform.

[Numbers 2 (Needs Improvement) and 3 (Good Effective Performance) are circled.]

Major Responsibility: Associate and Team Development
__Extremely important __ Very Important __Important

PS#1 – Holds team building meetings
1) Hold limited team meetings in 1997. In 1998 team meetings in the section need to be on a bimonthly basis.
PS#2 – Develops relationships, maintains relationships and communicates to associates
1) She is a very good communicator 2) She works well with the union representatives. 3) Maintains good relationships with all his team.

PS#3 – Provides feedback on performance to associates
1) Keeps team informed of key communications items. 2) Provides feedback to associates on controllable waste.

Associate Comments: _____

_____

_____

Rater Comments:
[handwritten] Lilly used external resource for team meetings to Improve team performance until stopped for overtime costs.

_____

Overall evaluation of Major Responsibility (Circle One)

5	4	3	2	1
Highly Outstndg Perform.	Good Effec Perform.	Effec Perform.	Needs Improvmnt	Poor - Perform.

[Number 3 (Good Effective Performance) is circled.]

Major Responsibility: Implementation of Policies and Procedures

__Extremely important __ Very Important __Important

PS#1 – Performs audits.
1) She does not perform daily audits on PPE 2) Several associates do not consistently wear all their PPE. 3) CHE/LOTO audits need to be formalized in 1998. 4) Exceptions need to be managed and discipline used when appropriate.

PS#2 – Effectively manages Discipline system.
1) Apply discipline consistently as needed on quality, waste and attendance problems. 2) Needs to utilize discipline in the area of production, waste and other policy-related problems.
PS#3 – Ensures associates work throughout shift
1) ARFs run throughout the shift. 2) Could make gains by better utilizing turbo time on the ARFs. 3) Needs to focus on reducing exceptions.

Associate Comments: _____

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_____

Rater Comments:

_____

_____

_____

Overall evaluation of Major Responsibility (Circle One)

5	4	3	2	1
Highly Outstndg Perform.	Good Effec Perform.	Effec Perform.	Needs Improvmnt	Poor Perform.

[Number 1 (Poor Performance) is circled.]

TRAINING AND DEVELOPMENTAL EXPERIENCES TO ENHANCE PERFORMANCE ON MAJOR RESPONSIBLITIES

Associate Name: Lilly Ledbetter For Performance Review Year: 1997

Major Responsibilities (MR's)	***Developmental Needs*** List knowledge, skills or experiences that can be enhanced to increase performance within a major responsibility	***Developmental Plans*** Describe training problems, job assignments, special projects or coaching that will take place in the upcoming year.	Date to be Completed
1			
2			
3			
4			
5			
6			
7			
8			
9			
10			
Overall/Specific Development Needs			

[The word "NONE" is handwritten diagonally across rows 1 and 2 in the second column.]

PERFORMANCE EVALUATION SUMMARY

MR Importance

3 = Extremely Important
2 = Very Important
1 = Important

Performance Categories

5 = Outstanding Performance
4 = Highly Effective Performance
3 = Good, Effective Performance
2 = Needs Improvement
1 = Poor Performance

	Importance	**Rating**
MR 1	3	1
MR 2	3	3
MR 3	3	2
MR 4	3	2
MR 5	3	3
MR 6	3	3
MR 7	3	1
MR 8		
MR 9		
MR 10		

Period Reviewed: From 1/97 To 12/97
Performance Evaluated By: /s/ R. K. Owen Date 2/4/98

Associate comments:

I have discussed the contents of this performance appraisal with my manager.

/s/ Lilly M. Ledbetter — Associate's Signature
2/5/93 — Date

1997 Reviews

Name	1 Safety	2 Q&W	3 Production	4 Cost	5 Housekeeping	6 Team Dev.	7 Imp.	8 Av. Score
R. Jones	4	5	4	3	4	4	3	3.86
McCleod	4	4	5	3	3	4	4	3.86
Miller	4	4	4.5	4	4	4.5	2	3.86
Barnes	3	2	3	4	3	5	4	3.43
Amberson	3	3	4	3.5	3	4-5	2	3.29
Cheatwood	3	3	4	3	3	3.5	3.5	3.29
Thompson	3	3	3	5	3	4	2	3.29
Elliott	3	2	3.5	3	3.5	3	4	3.14
Kell	4	3	3	3	3	3	3	3.14
Welch	3	3	4	3	4	3	2	3.14
Hicks	4	2	3	3	3	3	3	3
Gunter	2	4	2	3	4	3	2	2.86
Myers	3	4	2	3	3	3	2	2.86
Sitz	4	3	3	2	3	3	2	2.86
W. Chapman	3	2	3	3	2	3	3	2.71
J. Todd	2	2.8	3.6	3.1	2.8	2	2.5	2.69
Penny	2	3	2.5	2.5	3	3	2	2.57
Ledbetter	1	3	2	2	3	3	1	2.14
Nance	2	1	2	1	2.5	2	2	1.79

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TIRE ASSEMBLY SALARIED MERIT PLAN
YEAR BEGINNING 1/1/98 & ENDING 12/31/98

RANK	NAME	TITLE	PAY GRADE	PRESENT SALARY
1	Owen, RK	Bus Ctr Mgr	GGE08	6852
2	Holderfield, VB	Prod Spec	GGE04	5710
3	Mcloud, PM	Ar Mgr Pr Mtn	GGE04	5236.05
4	Jones, RD	Prod Spec	GGE04	5329.64
5	Miller, WC	Ar Mgr Pr Mtn	GGE04	5106.11
6	Dean, DR	Maint Mgr	GGE05	5122
7	Barnes, DA	Ar Mgr Pr Mtn	GGE04	4460.93
8	Cheatwood, JL	Ar Mgr Pr Mtn	GGE04	4394
9	Maudsley, MV	Prod Bs Ctr Aud	GGE05	5515
10	Elliott, CB	Ar Mgr Pr Mtn	GGE04	4673.88
11	Thompson, JS	Ar Mgr Pr Mtn	GGE04	4692.24
12	Kell, JA	Ar Mgr Pr Mtn	GGE04	4727
13	Gunter, RD	Ar Mgr Pr Mtn	GGE04	4286
14	Welch, BF	Ar Mgr Pr Mtn	GGE04	5080
15	Amberson, TR	Ar Mgr Pr Mtn	GGE04	4769.61
16	Hicks, WW	Ar Mgr Pr Mtn	GGE04	4870
17	Burnes, RL	Secy to Fact	GGE04	2398.90
18	Bice, WG	Maint Sec Mgr	GGE03	4532
19	Gilchrist, JA	Maint Sec Mgr	GGE03	5064.51
20	Sitz, PS	Ar Mgr Pr Mtn	GGE04	4480.50
21	Penney, WJ	Ar Mgr Pr Mtn	GGE04	5065
22	Myers, DB	Ar Mgr Pr Mtn	GGE04	4600
23	Ledbetter, LM	Ar Mgr Pr Mtn	GGE04	3727
24	Nance, WD	Ar Mgr Pr Mtn	GGE04	4652.67
		TOTALS		**115345.04**

MERIT ALLOCATION: 2883.626

COMP RATIO	PAY RANGE			LAST INCREASE		LDR RECOG	
	MIN	MID	MAX	%	DATE	%	AMT
0.92	3905	7470	10035	10	7/21/97	7.0	480.00
1.22	3458	4667	5876	3.7	12-1-97		
1.12	3458	4667	5876	4.2	5/1/97		
1.14	3458	4667	5876	4.4	1/1/97		
1.14	3458	4667	5876	4.1	1/1/97		
0.97	3919	5291	6663	3.7	12/1/97		
0.96	3458	4667	5876	3.0	7/1/97		
0.94	3458	4667	5876	2.1	11/1/97		
1.04	3919	5291	6663	3.7	11/1/96		
1.00	3458	4667	5876	2.7	1/1/97		
1.01	3458	4667	5876	2.9	1/1/97		
1.01	3458	4667	5876	3.1	11/1/96		
0.92	3458	4667	5876	3.5	11/1/96		
1.09	3458	4667	5876	2.4	11/1/96		
1.02	3458	4667	5876	3.8	2/1/97		
1.04	3458	4667	5876	2.1	10/1/97		
0.51	3458	4667	5876	4.3	4/1/97		
1.09	3075	4150	5225	3.0	7/1/97		
1.22	3075	4150	5225	3.0	11/1/97		
0.96	3458	4667	5876	3.0	2/1/97		
1.09	3458	4667	5876	2.8	10/1/96		
0.99	3458	4667	5876				
0.80	3458	4667	5876	3.8	12/1/95		
1.00	3458	4667	5876	4.0	11/1/95		
1.01							**480.00**

RANK	NAME	LEVEL 1		LEVEL 2		LUMP SUM
		%	AMT	%	AMT	
1	Owen, RK					
2	Holderfield, VB					
3	Mcloud, PM	4.11	215.00			
4	Jones, RD	4.00	213.00			
5	Miller, WC	4.01	205.00			
6	Dean, DR					
7	Barnes, DA	4.01	179.00			
8	Cheatwood, JL					
9	Maudsley, MV			3.25	179.00	
10	Elliott, CB			3.42	160.00	
11	Thompson, JS			3.41	160.00	
12	Kell, JA					
13	Gunter, RD			3.62	155.00	
14	Welch, BF			3.05	155.00	
15	Amberson, TR			3.14	150.00	
16	Hicks, WW			3.08	150.00	
17	Burnes, RL			3.84	92.00	
18	Bice, WG			3.09	140.00	
19	Gilchrist, JA					
20	Sitx, PS			3.01	135.00	
21	Penney, WJ					
22	Myers, DB					
23	Ledbetter, LM					
24	Nance, WD					
TOTALS			**812.00**		**1476.00**	

RANK	NAME	EFF DATE	INVL	NEW SALARY	NEW COMP :
1	Owen, RK	8/1/98	12	7332.00	0.98
2	Holderfield, VB			5710.00	1.22
3	McCloud, PM	2/1/98	14	5451.05	1.17
4	Jones, RD	3/1/97	14	5542.64	1.19
5	Miller, WC	3/1/97	14	5311.11	1.14
6	Dean, DR			5122.00	0.97
7	Barnes, DA	9/1/98	14	4639.93	0.99
8	Cheatwood, JL			4394.00	0.94
9	Maudsley, MV	3/1/98	16	5694.00	1.08
10	Elliott, CB	5/1/98	16	4833.88	1.04
11	Thompson, JS	5/1/98	16	4852.24	1.04
12	Kell, JA			4727.00	1.01
13	Gunter, RD	3/1/98	16	4441.00	0.95
14	Welch, BF	4/1/98	17	5235.00	1.12
15	Amberson, TR	7/1/98	17	4919.61	1.05
16	Hicks, WW	3/1/98	17	5020.00	1.08
17	Burnes, RL	9/1/98	17	2490.90	0.53
18	Bice, WG	12/1/98	17	4672.00	1.13
19	Gilchrist, JA			5064.51	1.22
20	Sizt, PAS	8/1/98	18	4615.50	0.99
21	Penney, WJ			5065.00	1.09
22	Myers, DB			4600.00	0.99
23	Ledbetter, LM			3727.00	0.80
24	Nance, WD			4652.67	1.00
TOTALS			**15.666667**	**118113.04**	**1.03**

AVERAGE= 3573.58
TOTAL MERIT USED= 2768.00
TOTAL AVAILABLE= 2768.00

/s/ RO Well 3/6/98

/s/ PH Elith
/s/ RC Cropps 3/5/98

RAISES GIVEN BY MIKE TUCKER TO RLT AREA MANAGERS					
	1993	1994	1995	1996	**TOTAL**
Dick Jones	$250.00	$288.00	$380.00	$0.00	**$918.00**
Lilly Ledbetter	165.00	163.00	276.00	0.00	**604.00**
Bill Miller	205.00	0.00	280.00	0.00	**485.00**
Steve Thompson	200.00	0.00	240.00	0.00	**440.00**
Jimmy Todd	0.00	250.00	0.00	0.00	**250.00**

06/02/00 GOODYEAR EMPLOYEE MANAGEMENT SYSTEM PAGE: 001
07:43:39 ** EMPLOYEE PROFILE ** FROM:01/01/60

EMPLOYEE: AMBERSON, TERRY R EMPLOYEE NUMBER: 416-62-6354

=== CURRENT INFORMATION ===

?? BROOKS DRIVE DOB: 12/04/47 DOD: SEX: M AGE: 53
MARTIN TN 38237 CSD: 03/05/73 PSD: 03/05/73 JSD: 04/01/99
RACE: WHITE HNCP: NOT DISABLED
VET: VET-OTHER CIT: U S CITIZEN

STATUS: A ACTIVE EMPCC: FS FULL TIME SALARIED GRADE: UNREP:

POS: 58506517463 TITLE: AREA MANAGER-PRODUCTION/MAINTE FLSA: 2
DEPT: 1512 LOCN: GT129 MIN: 3,671 MID: 4,956 MAX: 6,241
ORG1: PRODUCT SUPPLY ORG2: NORTH AMERICAN TIRE ORG3: GTR UNION CITY PLT
BASRT: 5,412.4700 PYRCD: 10032 PAY FREQ: S BASE FREQ: M MERIT BUDGET: 00157

=== JOB/SALARY ===

AS OF	BASE RATE	LOCATION	DEPT	TITLE	TYP	GRADE	EEO
04/01/99	5,412.4700	GTR UNION	1512	AREA MGR-PRODCTN/MAI	MS	0	A
04/01/99	5,068.1000	GTR GADSDE	5510	AREA MGR-PRODCTN/MAI	IP	0	A
07/01/98	4,919.6100	GTR GADSDE	5510	AREA MGR-PRODCTN/MAI	IP	0	A

02/01/97	4,769.6100	GTR GADSDE	5510	AREA MGR-PRODCTN/MAI	IP	0	A
01/01/97	4,595.0000	GTR GADSDE	5510	AREA MGR-PRODCTN/MAI	IC	0	A
10/01/95	4,595.0000	GTR GADSDE	5510	AREA MGR-PRODCTN/MAI	IP	0	A
02/01/95	4,425.0000	GTR GADSDE	5510	AREA MGR-PRODCTN/MAI	IC	0	A
07/01/94	4,425.0000	GTR GADSDE	5510	AREA MGR-PRODCTN/MAI	ME	0	A
04/01/94	4,208.0000	GTR GADSDE	5510	AREA MGR-PRODCTN/MAI	IC	0	A
01/01/94	4,208.0000	GTR GADSDE	5510	AREA MGR-PRODCTN/MAI	SC	0	A
04/01/93	4,208.0000	GTR GADSDE	5510	AREA MGR-PRODCTN/MAI	ME	0	A
11/01/91	3,983.0000	GTR GADSDE	5510	AREA MGR-PRODCTN/MAI	RO	0	A
10/01/91	3,983.0000	GTR GADSDE	5510	AREA MGR-PRODCTN/MAI	ME	0	A
04/01/90	3,838.0000	GTR GADSDE	5510	AREA MGR-PRODCTN/MAI	ME	0	A
??/16/89	3,578.0000	GTR GADSDE	5510	AREA MGR-PRODCTN/MAI	RO	0	A
??/?6/89	3,578.0000	GTR GADSDE	5510	AREA MGR-PRODCTN/MAI	TR	0	A
??/?5/89	3,578.0000	GTR GADSDE	0000	GENERAL OPERATOR	TR	0	G
05/22/89	3,578.0000	GT131	5510	AREA MGR-PRODCTN/MAI	RS	0	A
03/23/89	3,578.0000	GT131	5510	AREA MGR-PRODCTN/MAI	LA	0	A
02/01/89	3,578.0000	GT131	5510	AREA MGR-PRODCTN/MAI	ME	0	A
01/01/88	3,288.0000	GT131	5510	AREA MGR-PRODCTN/MAI	ME	0	A
12/01/86	3,038.0000	GT131	5510	AREA MGR-PRODCTN/MAI	ME	0	A
12/16/85	2,878.0000	GT131	5510	AREA MGR-PRODCTN/MAI	TR	0	A
11/01/85	2,878.0000	GT131	5500	SHFT FRMN-PROD REC&ST	ME	0	A
04/01/85	2,678.0000	GT131	5500	SHFT FRMN-PROD REC&ST	TR	0	A
10/01/84	2,678.0000	GT131	144	SHFT FRMN-PROD REC&ST	ME	0	A

08/01/83	2,515.0000	GT131	144	SHFT FRMN-PROD REC&ST	ME	0	A
04/01/82	2,329.0200	GT131	144	SHFT FRMN-PROD REC&ST	ME	0	A
10/01/81	2,109.0200	GT131	144	SHFT FRMN-PROD REC&ST	GC	0	A
07/01/81	2,067.5200	GT131	144	SHFT FRMN-PROD REC&ST	GC	0	A
05/01/81	1,916.0200	GT131	144	SHFT FRMN-PROD REC&ST	TC	0	A
04/01/81	1,916.0200	GT131	144	SUPERVISOR-PROD REC &	GC	0	A
04/01/81	2,026.0200	GT131	144	SUPERVISOR-PROD REC &	ME	0	A

961

EMPLOYEE: AMBERSON, TERRY R EMPLOYEE NUMBER: 416-62-6354

= = = JOB/SALARY = = =

AS OF	BASE RATE	LOCATION	DEPT	TITLE	TYP	GRADE	EEO
01/01/81	1,874.5200	GT131	144	SUPERVISOR-PROD REC &	GC	0	A
10/01/80	1,833.0200	GT131	144	SUPERVISOR-PROD REC &	GC	0	A
07/01/80	1,801.8200	GT131	144	SUPERVISOR-PROD REC &	GC	0	A
04/16/80	1,741.1500	GT131	144	SUPERVISOR-PROD REC &	GC	0	A
04/01/80	1,715.1500	GT131	144	SUPERVISOR-PROD REC &	GC	0	A
01/01/80	1,580.4800	GT131	144	SUPERVISOR-PROD REC &	GC	0	A
01/01/80	1,680.4800	GT131	144	SUPERVISOR-PROD REC &	ME	0	A

11/16/79	1,552.7500	GT131	144	SUPERVISOR-PROD REC &	TR	0	A
10/01/79	1,552.7500	GT131	132	SUPERVISOR-PROD REC &	GC	0	A
07/01/79	1,518.0800	GT131	132	SUPERVISOR-PROD REC &	GC	0	A
04/16/79	1,452.2100	GT131	132	SUPERVISOR-PROD REC &	GI	0	A
04/16/79	1,486.8800	GT131	132	SUPERVISOR-PROD REC &	GC	0	A
04/01/79	1,396.7100	GT131	132	SUPERVISOR-PROD REC &	GC	0	A
01/01/79	1,370.7100	GT131	132	SUPERVISOR-PROD REC &	GC	0	A
10/01/78	1,348.1800	GT131	132	SUPERVISOR-PROD REC &	GC	0	A
09/16/78	1,318.7100	GT131	132	SUPERVISOR-PROD REC &	TR	0	A
07/01/78	1,318.7100	GT900	1053	OUTSIDE PLNT SQD TRAI	GC	0	B
05/01/78	1,294.4400	GT900	1053	OUTSIDE PLNT SQD TRAI	GI	0	B
04/01/78	1,250.9400	GT900	1053	OUTSIDE PLNT SQD TRAI	GC	0	B
03/01/78	1,240.5400	GT900	1053	OUTSIDE PLNT SQD TRAI	TX	0	B
08/22/77	1,240.5400	GTR GADSDE	1440	HOURLY SUPERVISOR	TR	0	I
04/19/77	1,240.5400	GTR GADSDE	1440	PREPARE, CURE BLADS	RS	0	G
03/26/77	1,240.5400	GTR GADSDE	1440	PREPARE, CURE BLADS	LA	0	G
05/02/74	1,240.5400	GTR GADSDE	1440	PREPARE, CURE BLADS	TR	0	G
01/08/74	1,240.5400	GTR GADSDE	2565	NEST & SEAL TUBES	TR	0	G
01/07/74	1,250.9400	GTR GADSDE	2564	DEFLATE TUBES	TR	0	
11/01/73	1,240.5400	GTR GADSDE	1540	*OLD & BLAD. WORK	TR	0	G
11/01/73	1,240.5400	GTR GADSDE	1540	TEND CURED TIRE CO	TR	0	G
09/26/73	1,240.5400	GTR GADSDE	1540	TEND CURED TIRE CO	TR	0	G
09/26/73	1,240.5400	GTR GADSDE	2564	DEFLATE TUBES	TR	0	

??/09/73	1,240.5400	GTR GADSDE	2564	DEFLATE TUBES	TR	0
??/09/73	1,240.5400	GTR GADSDE	2564	REMOVE PASS TUBES	TR	0
0?/05/73	1,240.5400	GTR GADSDE	2564	REMOVE PASS TUBES	NH	0

= = = TRAINING INFORMATION = = =

AS OF	COURSE	COURSE DESCRIPTION
04/14/00	UC1848	TRU TRACK-PAYROLL REFRESHER
02/17/00	UC6330	HARASSMENT- "ZERO TOLERANCE"
11/22/99	UC1065	ANNUAL = TEST OUT PROCEDURE
07/27/99	UC6171	PERFORMANCE MGT / 360 DEGREE
05/03/99	UC1065	ANNUAL = TEST OUT PROCEDURE
04/27/99	UC6248	PRODUCTION PROCESS – B
04/27/99	UC6005	AREA MANAGER OJT
04/12/99	UC7097	UNIFORMITY; MEASURE OF SUCCESS
04/06/99	UC7101	PRODUCT SAFETY:INTER AWARENESS
04/05/99	UC7068	QS9000 – COMPUTER BY JOB CODE
04/05/99	UC7052	QS9000 – PROCESS
04/05/99	UC7050	QS9000 – COMPUTER APPLICATIONS
04/05/99	UC6093	NEW HIRE ORIENTATION

EMPLOYEE: AMBERSON, TERRY R EMPLOYEE NUMBER: 416-62-6354

= = = TRAINING INFORMATION = = =

AS OF	COURSE	COURSE DESCRIPTION
02/10/99	GD1050	ZERO TOLERANCE/ASSOC-HARASSMT
01/06/99	GD1068	SEXUAL HARASSMT STRATEGY-MGMT
06/11/98	GD4B03	BAR CODING INTRODUCTION
05/04/98	GD7055	ISO 9000 ELEMENT STUDY
09/11/97	GD1059	PERSONNEL TRANSPORT VEH REVIEW
03/01/97	GD4B01	COMPUTER INVENTORY STORAGE
10/19/96	GD7057	QS9000-CONCEPT & INTERPRET
10/02/96	GD7055	ISO 9000 ELEMENT STUDY
08/01/96	GD1051	LIQUID HAZARDOUS WASTE
07/15/96	GD7053	ISO PUBLIC VIEW
03/06/94	MFG001	ADVANCED LEADERSHIP SKILLS
09/01/87	MFG004	AREA MANAGER TIRES

***** END OF DOCUMENT *****

06/02/00 GOODYEAR EMPLOYEE MANAGEMENT SYSTEM PAGE: 001
07:44:00 ** EMPLOYEE PROFILE ** FROM:01/01/60

EMPLOYEE: BARNES, DAVID A EMPLOYEE NUMBER: 420-72-6878

=== CURRENT INFORMATION ===

4?? ROCKY KNOLL LANE DOB: 10/22/51 DOD: SEX: M AGE: 49
DANVILLE VA 24541 CSD: 01/03/72 PSD: 01/03/72 JSD: 04/01/99
RACE: WHITE HNCP: NOT DISABLED
VET: VET-OTHER CIT:

200

STATUS: A ACTIVE EMPCC: FS FULL TIME SALARIED GRADE: UNREP:

POS: 45506517463 TITLE: AREA MANAGER-PRODUCTION/MAINTE FLSA: 2
DEPT: 2541 LOCN: GT126 MIN: 3,671 MID: 4,956 MAX: 6,241
ORG1: PRODUCT SUPPLY ORG2: NORTH AMERICAN TIRE ORG3: GTR DANVILLE PLT
BASRT: 5,103.9300 PYRCD: 10009 PAY FREQ: S BASE FREQ: M MERIT BUDGET: 00156

=== JOB/SALARY ===

AS OF	BASE RATE	LOCATION	DEPT	TITLE	TYP	GRADE	EEO
04/01/99	5,103.9300	GTR DANVIL	2541	AREA MGR-PRODCTN/MAI	MS	0	A
04/01/99	4,871.9300	GTR GADSDE	5500	AREA MGR-PRODCTN/MAI	IP	0	A
09/01/98	4,639.9300	GTR GADSDE	5500	AREA MGR-PRODCTN/MAI	IP	0	A

07/01/97	4,460.9300	GTR GADSDE	5500	AREA MGR-PRODCTN/MAI	IP	0	A
01/01/97	4,331.0000	GTR GADSDE	5500	AREA MGR-PRODCTN/MAI	IC	0	A
03/01/96	4,331.0000	GTR GADSDE	5500	AREA MGR-PRODCTN/MAI	IP	0	A
02/01/95	4,186.0000	GTR GADSDE	5500	AREA MGR-PRODCTN/MAI	IC	0	A
10/01/94	4,186.0000	GTR GADSDE	5500	AREA MGR-PRODCTN/MAI	ME	0	A
04/01/94	4,016.0000	GTR GADSDE	5500	AREA MGR-PRODCTN/MAI	IC	0	A
01/01/94	4,016.0000	GTR GADSDE	5500	AREA MGR-PRODCTN/MAI	SC	0	A
04/01/93	4,016.0000	GTR GADSDE	5500	AREA MGR-PRODCTN/MAI	ME	0	A
11/01/91	3,795.0000	GTR GADSDE	5500	AREA MGR-PRODCTN/MAI	RO	0	A
09/01/91	3,795.0000	GTR GADSDE	5500	AREA MGR-PRODCTN/MAI	ME	0	A
06/25/90	3,650.0000	GTR GADSDE	5500	AREA MGR-PRODCTN/MAI	RS	0	A
05/23/90	3,650.0000	GTR GADSDE	5500	AREA MGR-PRODCTN/MAI	LA	0	A
??/??/90	3,650.0000	GTR GADSDE	5500	AREA MGR-PRODCTN/MAI	ME	0	A
??/??/90	3,440.0000	GTR GADSDE	5500	AREA MGR-PRODCTN/MAI	TR	0	A
10/16/89	3,440.0000	GTR GADSDE	5540	AREA MGR-PRODCTN/MAI	TR	0	A
09/25/89	3,440.0000	GTR GADSDE	0000	GENERAL OPERATOR	TR	0	G
03/01/89	3,440.0000	GT131	5540	AREA MGR-PRODCTN/MAI	ME	0	A
11/01/88	3,230.0000	GT131	5540	AREA MGR-PRODCTN/MAI	TR	0	A
08/01/86	3,230.0000	GT131	5540	QUALITY ASSUR LDR	ME	0	A
12/17/85	3,030.0000	GT131	5540	QUALITY ASSUR LDR	TR	0	A
04/01/85	3,030.0000	GT131	5500	SUPERVISOR-PROD REC &	ME	0	A
03/01/84	2,785.0000	GTR GADSDE	5500	SUPERVISOR-PROD REC &	ME	0	A
02/01/83	2,555.0000	GTR GADSDE	5500	SUPERVISOR-PROD REC &	ME	0	A

01/01/82	2,320.0000	GTR GADSDE	5500	SUPERVISOR-PROD REC &	ME	0	A
10/01/81	2,064.0200	GTR GADSDE	5500	SUPERVISOR-PROD REC &	GC	0	A
07/01/81	2,022.5200	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
04/01/81	1,981.0200	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
01/01/81	1,939.5200	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
12/01/80	1,898.0200	GT131	5500	SUPERVISOR-PROD REC &	ME	0	A
10/01/80	1,808.0200	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A

202

EMPLOYEE: BARNES, DAVID A EMPLOYEE NUMBER: 420-72-6878

= = = JOB/SALARY = = =

AS OF	BASE RATE	LOCATION	DEPT	TITLE	TYP	GRADE	EEO
07/01/80	1,776.8200	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
04/16/80	1,716.1500	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
04/01/80	1,690.1500	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
01/01/80	1,655.4800	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
12/01/79	1,627.7500	GT131	5500	SUPERVISOR-PROD REC &	ME	0	A
10/01/79	1,552.7500	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
07/01/79	1,518.0800	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A

04/16/79	1,452.2100	GT131	5500	SUPERVISOR-PROD REC &	GI	0	A
04/16/79	1,486.8800	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
04/01/79	1,396.7100	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
01/01/79	1,370.7100	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
10/01/78	1,348.1800	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
08/16/78	1,318.7100	GT131	5500	SUPERVISOR-PROD REC &	TR	0	A
07/01/78	1,318.7100	GT900	1053	OUTSIDE PLNT SQD TRAI	GC	0	B
05/01/78	1,294.4400	GT900	1053	OUTSIDE PLNT SQD TRAI	GI	0	B
04/01/78	1,250.9400	GT900	1053	OUTSIDE PLNT SQD TRAI	GC	0	B
02/01/78	1,240.5400	GT900	1053	OUTSIDE PLNT SQD TRAI	TS	0	B
02/21/77	1,240.5400	GTR GADSDE	3411	HOURLY SUPERVISOR	TR	0	I
09/15/76	1,240.5400	GTR GADSDE	3411	OPER. SPADONE BIAS	TR	0	G
11/04/75	1,240.5400	GTR GADSDE	1515	SORT WSW FOR RIB G	TR	0	G
12/06/74	1,240.5400	GTR GADSDE	3411	SPLICER PLAIN PL	TR	0	G
05/02/74	1,240.5400	GTR GADSDE	3411	REPAIR AND SALVAGE	TR	0	G
05/21/73	1,240.5400	GTR GADSDE	3411	OPER. SPADONE BIAS	TR	0	G
03/26/73	1,240.5400	GTR GADSDE	3411	REPAIR STOCK	TR	0	
03/26/73	1,240.5400	GTR GADSDE	3411	OPER. SPADONE BIAS	TR	0	G
07/14/72	1,240.5400	GTR GADSDE	3411	OPER. SPADONE BIAS	RS	0	G
02/26/72	1,240.5400	GTR GADSDE	3411	OPER. SPADONE BIAS	EX	0	G
01/03/72	1,240.5400	GTR GADSDE	3411	OPER. SPADONE BIAS	NH	0	G

= = = TRAINING INFORMATION = = =

AS OF	COURSE	COURSE DESCRIPTION
03/18/00	DN6131	SALARY COMMUNICATIONS
09/21/99	DN1063	PERSONAL PROTECTIVE EQUIPMENT
07/27/99	DN8038	PHOENIX – AS/400 PLANT SPEC
06/28/99	DN1060	LOCKOUT/TAGOUT
06/09/99	DN7028	UNIFORMITY: MEASURE OF SUCCESS
04/28/99	DN1057	HEAT STRESS PREVENTION
04/27/99	DN7030	QS – PRODUCT SAFETY
02/02/99	GD1050	SEXUAL HARRASSMENT
01/06/99	GD1068	SEXUAL HARASSMT STRATEGY-MGMT
11/16/98	GD8086	GBS AS/400 PLANT SPEC
06/11/98	GD4B03	BAR CODING INTRODUCTION
05/04/98	GD7055	ISO 9000 ELEMENT STUDY
04/22/98	GD6024	COMMUNICATION SKILLS FOR MGRS
09/11/97	GD1059	PERSONNEL TRANSPORT VEH REVIEW
03/01/97	GD4B01	COMPUTER INVENTORY STORAGE
10/19/96	GD7057	QS9000-CONCEPT & INTERPRET
10/02/96	GD7055	ISO 9000 ELEMENT STUDY
08/01/96	GD1051	LIQUID HAZARDOUS WASTE

EMPLOYEE: BARNES, DAVID A EMPLOYEE NUMBER: 420-72-6878

=== TRAINING INFORMATION ===

AS OF	COURSE	COURSE DESCRIPTION
07/15/96	GD7053	ISO PUBLIC VIEW
05/07/93	MFG001	ADVANCED LEADERSHIP SKILLS

***** END OF DOCUMENT *****

06/01/00 GOODYEAR EMPLOYEE MANAGEMENT SYSTEM PAGE: 001
12:25:39 ** EMPLOYEE PROFILE ** FROM:01/01/01

EMPLOYEE: MYERS, DONALD B EMPLOYEE NUMBER: 303-60-0530

=== CURRENT INFORMATION ===

?? GOODYEAR AVE DOB: 01/04/51 DOD: SEX: M AGE: 49
APT #110 RIVERWALK APT CSD: 11/16/77 PSD: 11/16/77 JSD: 12/01/99
GADSDEN AL 35903 RACE: WHITE HNCP: NOT DISABLED
VET: NO MILITARY CIT: U S CITIZEN

STATUS: A ACTIVE EMPCC: FS FULL TIME SALARIED GRADE: UNREP:

POS: 546006517463 TITLE: AREA MANAGER-PRODUCTION/MAINTE FLSA: 2
DEPT: 5540 LOCN: GT131 MIN: 3,671 MID: 4,956 MAX: 6,241
ORG1: PRODUCT SUPPLY ORG2: NORTH AMERICAN TIRE ORG3: GTR GADSDEN PLT
BASRT: 5,529.0000 PYRCD: 10011 PAY FREQ: S BASE FREQ: M MERIT BUDGET: 00151

=== JOB/SALARY ===

AS OF	BASE RATE	LOCATION	DEPT	TITLE	TYP	GRADE	EEO
12/01/99	5,529.0000	GTR GADSDE	5540	AREA MGR-PRODCTN/MAI	TR	0	A
01/01/99	5,529.0000	GTR AKR CO	841	SPLY CHAIN ANAL COORD	PR	0	B
11/01/98	4,808.0000	GTR GADSDE	5500	PRODUCTION SPECIALIST	MS	0	B

09/01/97	4,371.0000	GTR GADSDE	5500	AREA MGR-PRODCTN/MAI	IP	0	A
08/11/97	4,196.0000	GTR GADSDE	5500	AREA MGR-PRODCTN/MAI	DC	0	A
01/01/97	4,196.0000	GTR GADSDE	5404	AREA MGR-PRODCTN/MAI	IC	0	A
??/01/96	4,196.0000	GTR GADSDE	5404	AREA MGR-PRODCTN/MAI	TP	0	A
??/??/96	4,078.0000	GTR GADSDE	5404	AREA MGR-PRODCTN/MAI	TP	0	A
12/01/95	3,960.0000	GTR GADSDE	5404	AREA MGR-PRODCTN/MAI	IC	0	A
12/01/94	3,960.0000	GTR GADSDE	5404	AREA MGR-PRODCTN/MAI	ME	0	A
04/01/94	3,735.0000	GTR GADSDE	5404	AREA MGR-PRODCTN/MAI	IC	0	A
01/01/94	3,735.0000	GTR GADSDE	5404	AREA MGR-PRODCTN/MAI	SC	0	A
10/01/93	3,735.0000	GTR GADSDE	5404	AREA MGR-PRODCTN/MAI	ME	0	A
10/01/92	3,585.0000	GTR GADSDE	5404	AREA MGR-PRODCTN/MAI	ME	0	A
11/01/91	3,385.0000	GTR GADSDE	5404	AREA MGR-PRODCTN/MAI	RO	0	A
09/01/91	3,385.0000	GTR GADSDE	5404	AREA MGR-PRODCTN/MAI	ME	0	A
07/16/90	3,255.0000	GTR GADSDE	5404	AREA MGR-PRODCTN/MAI	ME	0	A
10/16/89	3,005.0000	GTR GADSDE	5404	AREA MGR-PRODCTN/MAI	RO	0	A
09/01/89	3,005.0000	GTR GADSDE	5404	AREA MGR-PRODCTN/MAI	RO	0	A
06/16/89	3,005.0000	GT131	5404	AREA MGR-PRODCTN/MAI	ME	0	A
05/01/88	2,835.0000	GT131	5404	AREA MGR-PRODCTN/MAI	FM	0	A
07/20/87	2,700.0000	GT131	5404	AREA MGR-PRODCTN/MAI	TR	0	A
07/06/87	2,700.0000	GT131	132	AREA MGR-PRODCTN/MAI	RC	0	A
05/16/86	2,700.0000	GT131	5500	AREA MGR-PRODCTN/MAI	LD	0	A
12/01/85	2,700.0000	GT131	5500	AREA MGR-PRODCTN/MAI	ME	0	A
11/01/84	2,530.0000	GT131	5500	SUPERVISOR-PROD REC &	ME	0	A

07/01/83	2,410.0000	GTR GADSDE	5500	SUPERVISOR-PROD REC &	ME	0	A
02/01/82	2,270.0000	GTR GADSDE	5500	SUPERVISOR-PROD REC &	ME	0	A
10/01/81	2,064.0200	GTR GADSDE	5500	SUPERVISOR-PROD REC &	GC	0	A
07/01/81	2,022.5200	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
04/01/81	1,981.0200	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
01/01/81	1,939.5200	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
??/?1/80	1,898.0200	GT131	5500	SUPERVISOR-PROD REC &	ME	0	A

EMPLOYEE: MYERS, DONALD B EMPLOYEE NUMBER: 303-60-0530

= = = JOB/SALARY = = =

AS OF	BASE RATE	LOCATION	DEPT	TITLE	TYP	GRADE	EEO
10/01/80	1,808.0200	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
07/01/80	1,776.8200	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
04/16/80	1,716.1500	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
04/01/80	1,690.1500	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
01/01/80	1,655.4800	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
12/01/79	1,627.7500	GT131	5500	SUPERVISOR-PROD REC &	ME	0	A
10/01/79	1,552.7500	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A

07/01/79	1,518.0800	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
04/16/79	1,452.2100	GT131	5500	SUPERVISOR-PROD REC &	GI	0	A
04/16/79	1,486.8800	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
04/01/79	1,396.7100	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
01/01/79	1,370.7100	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
10/01/78	1,348.1800	GT131	5500	SUPERVISOR-PROD REC &	GC		A
07/01/78	1,318.7100	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
05/16/78	1,294.4400	GT131	5500	SUPERVISOR-PROD REC &	TR	0	A
05/01/78	1,294.4400	GT900	1053	OUTSIDE PLNT SQD TRAI	GI	0	B
04/01/78	1,250.9400	GT900	1053	OUTSIDE PLNT SQD TRAI	GC	0	B
01/01/78	1,240.5400	GT900	1053	OUTSIDE PLNT SQD TRAI	GC	0	B
11/16/77	1,231.8700	GT900	1053	OUTSIDE PLNT SQD TRAI	NH	0	B

= = = TRAINING INFORMATION = = =

AS OF	COURSE	COURSE DESCRIPTION
03/07/00	GD1034	OFF THE JOB SAFETY
03/07/00	GD1018	RADIATION--MISCELLANEOUS
03/07/00	GD1001	ASBESTOS--MISCELLANEOUS
03/07/00	GD1002	CONFINED SPACES--MISCELLANEOUS
03/07/00	GD1054	HOIST TRAINING/INSPECTION
03/07/00	GD1014	LOCKOUT/TAGOUT--MISCELLANEOUS
03/07/00	GD1007	FIRE SAFETY—MISCELLANEOUS

03/07/00	GD1004	ELECTRICAL SAFETY—MISCELL
03/07/00	GD1009	HAZCOM—MISCELLANEOUS
03/07/00	GD1066	MATERIAL HANDLING (BACK CARE)
03/07/00	GD1006	ERGONOMICS--MISCELLANEOUS
03/07/00	GD1013	LASERS—MISCELLANEOUS
03/07/00	GD1055	BLOOD-BORNE PATHOGENS
03/07/00	GD1011	HEAT STRESS—MISCELLANEOUS
03/07/00	GD1065	ACCESS TO EYEWASH
03/07/00	GD1010	HEARING CONSERVATION—MISC
03/07/00	GD1016	PERSONAL PROTECTION EQUI—MISC
03/07/00	GD1022	ACCIDENT PREVENTION SIGNS
03/07/00	GD1029	EMERGENCY PLANS RESPONSE
03/07/00	GD2001	ACCIDENT INVESTIGATION
03/07/00	GD1027	ACCESS TO RECORDS
03/07/00	GD1067	GENERAL SAFETY AWARENESS
10/28/99	GTPHS3	GBS SPEC CHANGE CONTROL III
10/28/99	GTPHS1	GBS SPEC CHANGE CONTROL I
08/27/99	GTPHT1	GBS TIRE SPECIFICATION I
08/27/99	GTPHS2	GBS SPEC CHANGE CONTROL II
08/27/99	GTPHS1	GBS SPEC CHANGE CONTROL I

EMPLOYEE: MYERS, DONALD B EMPLOYEE NUMBER: 303-60-0530

= = = TRAINING INFORMATION = = =

AS OF	COURSE	COURSE DESCRIPTION
08/27/99	GTPHOV	GBS OVERVIEW
08/27/99	GTPHNG	GBS GRAPHICAL NAVIGATION
12/02/98	GD8086	GBS AS/400 PLANT SPEC
11/09/98	GD8068	MS EXCELL BASIC
09/28/98	GD8005	MS WORD BASICS
09/09/98	GD6222	BUSINESS CONDUCT
09/04/98	GD1015	MILL RESCUE--MISCELLANEOUS
06/11/98	GD4B03	BAR CODING INTRODUCTION
09/12/97	GD1059	PERSONNEL TRANSPORT VEH REVIEW
02/28/97	GD7048	ISO9000 PJ INTERNAL AUDITOR
01/25/97	GD7057	QS9000-CONCEPT & INTERPRET
10/02/96	GD7055	ISO 9000 ELEMENT STUDY
09/26/93	MFG001	ADVANCED LEADERSHIP SKILLS
03/17/89	MFG004	AREA MANAGER TIRES

***** END OF DOCUMENT *****

06/02/00 GOODYEAR EMPLOYEE MANAGEMENT SYSTEM PAGE: 001
07:44:26 ** EMPLOYEE PROFILE ** FROM:01/01/60

EMPLOYEE: THOMPSON, JERRY S EMPLOYEE NUMBER: 422-82-3807

=== CURRENT INFORMATION ===

1?? SHADOW WOOD COVE DOB: 08/09/55 DOD: SEX: M AGE: 45
MARTIN TN 38237 CSD: 08/20/75 PSD: 08/20/75 JSD: 04/16/99
RACE: WHITE HNCP: NOT DISABLED
VET: NO MILITARY CIT:

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STATUS: A ACTIVE EMPCC: FS FULL TIME SALARIED GRADE: UNREP:

POS: 58506517463 TITLE: AREA MANAGER-PRODUCTION/MAINTE FLSA: 2
DEPT: 1512 LOCN: GT129 MIN: 3,671 MID: 4,956 MAX: 6,241
ORG1: PRODUCT SUPPLY ORG2: NORTH AMERICAN TIRE ORG3: GTR UNION CITY PLT
BASRT: 5,337.4600 PYRCD: 10032 PAY FREQ: S BASE FREQ: M MERIT BUDGET: 00157

=== JOB/SALARY ===

AS OF	BASE RATE	LOCATION	DEPT	TITLE	TYP	GRADE	EEO
04/16/99	5,337.4600	GTR DANVIL	1512	AREA MGR-PRODCTN/MAI	MS	0	A
04/16/99	5,046.3300	GTR GADSDE	5520	AREA MGR-PRODCTN/MAI	IP	0	A
05/01/98	4,852.2400	GTR GADSDE	5520	AREA MGR-PRODCTN/MAI	IP	0	A

?1/01/97	4,692.2400	GTR GADSDE	5520	AREA MGR-PRODCTN/MAI	IP	0	A
04/01/95	4,560.0000	GTR GADSDE	5520	AREA MGR-PRODCTN/MAI	TO	0	A
04/01/95	4,440.0000	GTR GADSDE	5520	AREA MGR-PRODCTN/MAI	IP	0	A
?2/01/95	4,320.0000	GTR GADSDE	5520	AREA MGR-PRODCTN/MAI	IC	0	A
04/01/94	4,320.0000	GTR GADSDE	5520	AREA MGR-PRODCTN/MAI	IC	0	A
?1/01/94	4,320.0000	GTR GADSDE	5520	AREA MGR-PRODCTN/MAI	SC	0	A
09/01/93	4,320.0000	GTR GADSDE	5520	AREA MGR-PRODCTN/MAI	ME	0	A
07/01/92	4,120.0000	GTR GADSDE	5520	AREA MGR-PRODCTN/MAI	ME	0	A
??/16/92	3,870.0000	GTR GADSDE	5520	AREA MGR-PRODCTN/MAI	DC	0	A
??/01/91	3,870.0000	GTR GADSDE	5510	AREA MGR-PRODCTN/MAI	RO	0	A
??/01/91	3,870.0000	GTR GADSDE	5510	AREA MGR-PRODCTN/MAI	Me	0	A
??/01/90	3,720.0000	GTR GADSDE	5510	AREA MGR-PRODCTN/MAI	Me	0	A
??/??/89	3,460.0000	GTR GADSDE	5510	AREA MGR-PRODCTN/MAI	Ro	0	A
??/??/89	3,460.0000	GT131	5510	AREA MGR-PRODCTN/MAI	Me	0	A
??/01/88	3,210.0000	GT131	5510	AREA MGR-PRODCTN/MAI	Me	0	A
??/01/87	3,010.0000	GT131	5510	SUPERVISOR-PROD REC &	Me	0	A
??/01/85	2,860.0000	GT131	5510	SUPERVISOR-PROD REC &	Me	0	A
??/01/84	2,655.0000	GT131	5500	SUPERVISOR-PROD REC &	Me	0	A
??/01/83	2,435.0000	GTR GADSDE	5500	SUPERVISOR-PROD REC &	ME	0	A
??/16/82	2,230.0000	GTR GADSDE	5500	SUPERVISOR-PROD REC &	RS	0	A
??/29/82	2,230.0000	GTR GADSDE	5500	SUPERVISOR-PROD REC &	LA	0	A
??/01/82	2,230.0000	GTR GADSDE	5500	SUPERVISOR-PROD REC &	ME	0	A
??/01/81	2,054.0200	GTR GADSDE	5500	SUPERVISOR-PROD REC &	GC	0	A

??/01/81	2.012.5200	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
??/01/81	1,971.0200	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
??/01/81	1,929.5200	GT131	5500	SUPERVISOR-PROD REC &	ME	0	A
??/01/81	1,849.5200	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
??/01/80	1,808.0200	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
??/01/80	1,776.8200	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
??/16/80	1,716.1500	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A

EMPLOYEE: THOMPSON, JERRY S EMPLOYEE NUMBER: 422-82-3807

= = = JOB/SALARY = = =

AS OF	BASE RATE	LOCATION	DEPT	TITLE	TYP	GRADE	EEO
04/01/80	1,690.1500	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
01/01/80	1,655.4800	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
12/01/79	1,627.7500	GT131	5500	SUPERVISOR-PROD REC &	ME	0	A
10/01/79	1,552.7500	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
07/01/79	1,518.0800	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
04/16/79	1,452.2100	GT131	5500	SUPERVISOR-PROD REC &	GI	0	A
04/16/79	1,486.8800	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A

04/01/79	1,396.7100	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
01/01/79	1,370.7100	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
10/01/78	1,348.1800	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
07/16/78	1,318.7100	GT131	5500	SUPERVISOR-PROD REC &	TR	0	A
07/01/78	1,318.7100	GT900	1053	OUTSIDE PLNT SQD TRAI	GC	0	B
05/01/78	1,294.4400	GT900	1053	OUTSIDE PLNT SQD TRAI	GI	0	B
04/01/78	1,250.9400	GT900	1053	OUTSIDE PLNT SQD TRAI	GC	0	B
?1/16/78	1,240.5400	GT900	1053	OUTSIDE PLNT SQD TRAI	TX	0	B
?1/14/77	1,240.5400	GTR GADSDE	1540	SORT TIRES, SERVIC	TR	0	I
09/09/77	1,240.5400	GTR GADSDE	1515	SORT WSW FOR RIB G	TR	0	G
09/09/77	1,240.5400	GTR GADSDE	1540	MAINT/LN.SRT.TIRES	TR	0	G
?2/07/77	1,240.5400	GTR GADSDE	1540	MAINT/LN.SRT.TIRES	RS	0	G
?2/23/76	1,240.5400	GTR GADSDE	1540	MAINT/LN.SRT.TIRES	LA	0	G
09/05/75	1,240.5400	GTR GADSDE	1540	MAINT/LN.SRT.TIRES	TR	0	
09/05/75	1,240.5400	GTR GADSDE	3524	VACATION REPLACEME	TR	0	G
08/20/75	1,240.5400	GTR GADSDE	3524	VACATION REPLACEME	NH	0	G

= = = TRAINING INFORMATION = = =

AS OF	COURSE	COURSE DESCRIPTION
04/14/00	UC8148	TRU TRACK-PAYROLL REFRESHER
11/22/99	UC1065	ANNUAL = TEST OUT PROCEDURE
07/27/99	UC6171	PERFORMANCE MGT / 360 DEGREE

04/27/99	UC6005	AREA MANAGER OJT
04/27/99	UC6248	PRODUCTION PROCESS – B
04/14/99	UC1065	ANNUAL = TEST OUT PROCEDURE
04/14/99	UC4C15	1512 – SPECS/TOL/SPOT CARD
04/14/99	UC7052	QS9000 – PROCESS
04/14/99	UC7101	PRODUCT SAFETY:INTER AWARENESS
04/13/99	UC6093	NEW HIRE ORIENTATION
04/12/99	UC7068	QS9000 – COMPUTER BY JOB CODE
04/12/99	UC7052	QS9000 – PROCESS
04/12/99	UC7050	QS9000 – COMPUTER APPLICATIONS
04/12/99	UC7097	UNIFORMITY; MEASURE OF SUCCESS
02/10/99	GD1050	ZERO TOLERANCE/ASSOC-HARASSMT
06/25/98	GD4B03	BAR CODING INTRODUCTION
05/04/98	GD7055	ISO 9000 ELEMENT STUDY
01/06/98	GD1068	SEXUAL HARASSMT STRATEGY-MGMT
09/11/97	GD1059	PERSONNEL TRANSPORT VEH REVIEW
10/19/96	GD7057	QS9000-CONCEPT & INTERPRET
10/02/96	GD7055	ISO 9000 ELEMENT STUDY
07/15/96	GD7053	ISO PUBLIC VIEW
05/07/93	MFG001	ADVANCED LEADERSHIP SKILLS

EMPLOYEE: THOMPSON, JERRY S EMPLOYEE NUMBER: 422-82-3807

= = = TRAINING INFORMATION = = =

AS OF	COURSE	COURSE DESCRIPTION
01/01/88	MFG004	AREA MANAGER TIRES

***** END OF DOCUMENT *****

06/02/00 GOODYEAR EMPLOYEE MANAGEMENT SYSTEM PAGE: 001
07:44:00 ** EMPLOYEE PROFILE ** FROM:01/01/60

EMPLOYEE: TODD, JIMMY R EMPLOYEE NUMBER: 420-60-0358

=== CURRENT INFORMATION ===

1?? COUNTY RD 405
LEESBURG AL 35983

DOB: 04/08/47 DOD: SEX: M AGE: 53
CSD: 07/07/69 PSD: 07/07/69 JSD: 00/00/00
RACE: WHITE HNCP: NOT DISABLED
VET: VET-OTHER CIT:

STATUS: A ACTIVE EMPCC: FS FULL TIME SALARIED GRADE: UNREP:

POS: 46006517463 TITLE: AREA MANAGER-PRODUCTION/MAINTE FLSA: 2
DEPT: 1430 LOCN: GT131 MIN: 3,671 MID: 4,956 MAX: 6,241
ORG1: PRODUCT SUPPLY ORG2: NORTH AMERICAN TIRE ORG3: GTR GADSDEN PLT
BASRT: 4,662.0000 PYRCD: 10011 PAY FREQ: S BASE FREQ: M MERIT BUDGET: 00151

=== JOB/SALARY ===

AS OF	BASE RATE	LOCATION	DEPT	TITLE	TYP	GRADE	EEO
09/01/97	4,662.0000	GTR DANVIL	1430	AREA MGR-PRODCTN/MAI	DC	0	A
?1/01/97	4,662.0000	GTR GADSDE	5520	AREA MGR-PRODCTN/MAI	IC	0	A
?2/01/95	4,662.0000	GTR GADSDE	5520	AREA MGR-PRODCTN/MAI	IC	0	A

219

04/01/94	4,662.0000	GTR GADSDE	5520	AREA MGR-PRODCTN/MAI	IC	0	A
?2/01/94	4,662.0000	GTR GADSDE	5520	AREA MGR-PRODCTN/MAI	ME	0	A
??/01/94	4,412.0000	GTR GADSDE	5520	AREA MGR-PRODCTN/MAI	SC	0	A
??/01/92	4,412.0000	GTR GADSDE	5520	AREA MGR-PRODCTN/MAI	ME	0	A
??/??/92	4,162.0000	GTR GADSDE	5520	AREA MGR-PRODCTN/MAI	DC	0	A
??/??/91	4,162.0000	GTR GADSDE	3530	AREA MGR-PRODCTN/MAI	RO	0	A
??/01/91	4,162.0000	GTR GADSDE	3530	AREA MGR-PRODCTN/MAI	ME	0	A
??/01/90	3,962.0000	GTR GADSDE	3530	AREA MGR-PRODCTN/MAI	ME	0	A
??/16/89	3,703.0000	GTR GADSDE	3530	AREA MGR-PRODCTN/MAI	RO	0	A
??/16/89	3,703.0000	GTR GADSDE	3530	AREA MGR-PRODCTN/MAI	TR	0	A
??/25/89	3,703.0000	GTR GADSDE	0000	GENERAL OPERATOR	TR	0	G
??/01/89	3,703.0000	GT131	3530	AREA MGR-PRODCTN/MAI	ME	0	A
??/01/89	3,429.0000	GT131	3530	AREA MGR-PRODCTN/MAI	TR	0	A
??/16/87	3,429.0000	GT131	253	AREA MGR-PRODCTN/MAI	ME	0	A
??/16/86	3,264.0000	GT131	253	AREA MGR-PRODCTN/MAI	ME	0	A
??/13/85	3,079.0000	GT131	253	SUPERVISOR-PROD REC &	TR	0	G
??/01/85	3,079.0000	GT131	352A	SUPERVISOR-PROD REC &	ME	0	A
??/01/84	2,829.0000	GT131	352A	SUPERVISOR-PROD REC &	ME	0	A
??/01/83	2,620.0000	GTR GADSDE	5500	SUPERVISOR-PROD REC &	ME	0	A
??/01/82	2,361.0200	GTR GADSDE	5500	SUPERVISOR-PROD REC &	ME	0	A
??/01/81	2,101.0200	GTR GADSDE	5500	SUPERVISOR-PROD REC &	GC	0	A
??/01/81	2,059.5200	GT131	352A	SUPERVISOR-PROD REC &	GC	0	A
??/01/81	1,918.0200	GT131	352A	SUPERVISOR-PROD REC &	GC	0	A

??/01/81	2,018.0200	GT131	352A	SUPERVISOR-PROD REC &	FM	0	A
??/01/81	1,876.5200	GT131	352A	SUPERVISOR-PROD REC &	GC	0	A
??/01/81	1,835.0200	GT131	352A	SUPERVISOR-PROD REC &	GC	0	A
??/01/80	1,803.8200	GT131	352A	SUPERVISOR-PROD REC &	GC	0	A
??/01/80	1,743.1500	GT131	352A	SUPERVISOR-PROD REC &	GC	0	A
??/16/80	1,939.5200	GT131	352A	SUPERVISOR-PROD REC &	GC	0	A
??/ 01/80	1,717.1500	GT131	352A	SUPERVISOR-PROD REC &	GC	0	A
??/16/80	1,682.4800	GT131	352A	SUPERVISOR-PROD REC &	ME	0	A

EMPLOYEE: TODD, JIMMY R EMPLOYEE NUMBER: 420-60-0358

= = = JOB/SALARY = = =

AS OF	BASE RATE	LOCATION	DEPT	TITLE	TYP	GRADE	EEO
01/01/80	1,580.4800	GT131	352A	SUPERVISOR-PROD REC &	GC	0	A
10/01/79	1,552.7500	GT131	352A	SUPERVISOR-PROD REC &	GC	0	A
07/01/79	1,518.0800	GT131	352A	SUPERVISOR-PROD REC &	GC	0	A
04/16/79	1,452.2100	GT131	352A	SUPERVISOR-PROD REC &	GI	0	A
04/16/79	1,486.8800	GT131	352A	SUPERVISOR-PROD REC &	ME	0	A
04/01/79	1,396.7100	GT131	352A	SUPERVISOR-PROD REC &	GC	0	A

01/01/79	1,370.7100	GT131	352A	SUPERVISOR-PROD REC &	GC	0	A
?0/01/78	1,348.1800	GT131	352A	SUPERVISOR-PROD REC &	GC	0	A
09/16/78	1,318.7100	GT131	5500	SUPERVISOR-PROD REC &	GC	0	A
07/01/78	1,318.7100	GT900	1053	OUTSIDE PLNT SQD TRAI	TR	0	B
05/01/78	1,294.4400	GT900	1053	OUTSIDE PLNT SQD TRAI	GC	0	B
04/01/78	1,250.9400	GT900	1053	OUTSIDE PLNT SQD TRAI	GI	0	B
??/01/78	1,240.5400	GT900	1053	OUTSIDE PLNT SQD TRAI	GC	0	B
05/02/77	1,240.5400	GTR GADSDE	3550	HOURLY SUPERVISOR	TS	0	I
04/24/72	1,240.5400	GTR GADSDE	3550	BUILD TIRES PB MAC	TR	0	G
04/24/72	1,240.5400	GTR GADSDE	1411	BEAD SERVICE-HAND	TR	0	
??/07/72	1,240.5400	GTR GADSDE	1411	BEAD SERVICE-HAND	TR	0	
??/05/69	1,240.5400	GTR GADSDE	3550	BUILD TIRES PB MAC	TR	0	G
??/07/69	1,240.5400	GTR GADSDE	3411	BUILD BAND-BANNER	NH	0	

= = = TRAINING INFORMATION = = =

AS OF	COURSE	COURSE DESCRIPTION
03/11/99	GD1015	MILL RESCUE--MISCELLANEOUS
02/02/99	GD1050	SEXUAL HARRASSMENT
01/06/99	GD1068	SEXUAL HARASSMT STRATEGY-MGMT
12/17/98	GD1015	MILL RESCUE—MISCELLANEOUS
09/09/98	GD6222	BUSINESS CONDUCT
09/09/97	GD1059	PERSONNEL TRANSPORT VEH REVIEW

08/15/97	GD1055	MILL RESCUE—MISCELLANEOUS
02/24/97	GD4A01	COMPUTER INVENTORY STORAGE
02/19/97	GD7057	QS9000-CONCEPT & INTERPRET
10/02/96	GD7055	ISO 9000 ELEMENT STUDY
07/15/96	GD7053	ISO PUBLIC VIEW
06/06/94	MFG001	ADVANCED LEADERSHIP SKILLS
06/01/87	MFG004	AREA MANAGER TIRES

***** END OF DOCUMENT *****

LILLY LEDBETTER			
YEAR	**ENDING SALARY**	**RAISE**	**PERCENTAGE**
1979	$1552	--	--
1980	$1794	$242	15.59%
1981	$1960	$166	9.25%
1982	$2110	$150	7.65%
1983	$2245	$135	6.39%
1984	$2365	$120	5.34%
1985	$2535	$170	7.19%
1986	$2535	$0	0
1987	$2535	$0	0
1988	$2535	$0	0
1989	$2687	$152	5.99%
1990	$2687	$0	0
1991	$2928	$241	8.86%
1992	$3123	$195	6.65%

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

EASTERN DIVISION

LILLY M. LEDBETTER	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Civil Action Number:**
	)	**CV-99-C-3137-E**
GOODYEAR TIRE AND	)	
RUBBER COMPANY,	)	
INC.,	)	
	)	
Defendant.	)	

PLAINTIFF'S LOST WAGES SUBMISSION PURSUANT TO COURT'S INSTRUCTION AT THE MAY 30, 2003 HEARING

COMES NOW the plaintiff, Lilly M. Ledbetter, by and through her undersigned counsel, and submits the attached backpay chart in compliance with this Court's instruction at the May 30, 2003 hearing.

1. Pursuant to this Court's instructions, the plaintiff has calculated her backpay from two years before she filed her EEOC Charge to her last date of employment. That period of time is from March 25, 1996 to November 1, 1998.

2. The plaintiff compared her salary to Terry Amberson, a comparator whom she presented to the jury.

3. In performing her backpay calculation, the plaintiff computed interest to June 2, 2003, and subtracted out her interim earnings. As of June 2, 2003, the plaintiff's backpay totaled **$41,683.74** (See EX A).

4. In addition, as the plaintiff's counsel mentioned in the May 30, 2003 hearing, when the plaintiff retired she testified that she received a severance package at eighty-percent (80%) of her salary[1]. On the date of her retirement, the plaintiff received $28,898. (Ledbetter p. 58, EX C). Had Ledbetter retired at the salary Terry Amberson was receiving, she would have received $38,141.16, or an additional $9,242.58 in her severance package. (EX D). When interest is computed from November 1, 1998, the date she received her severance package, to June 2, 2003, that number is **$12,917.42**. (EX E).

5. Adding the backpay number **($41,683)** to the additional severance number **($12,917)** equals **$54,601.16**.

Wherefore, premises considered, for her Title VII backpay claim based on the non overtime salary numbers, and limited to the time period of 3/25/96 to 6/2/03, the plaintiff moves this Court to award her $54,601.16 in lost wages in addition to the compensatory and punitive damages awarded by the jury.

Respectfully submitted,

_____

Jon C. Goldfarb
Attorney for plaintiff

---

[1] Goodyear's 80% rule yields a result actually less than 80%. The number is derived by dividing the entire yearly salary by 52 weeks, multiplying that number by a specific multiplier, which is based upon years of service, and then taking 80% of that number. (See EX B p. 3).

OF COUNSEL:

Gordon, Silberman, Wiggins & Childs, P.C.
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Birmingham, Alabama 35203
Telephone No.: (205) 328-0640

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by placing a copy of same in the Unites States mail, postage prepaid and addressed as follows:

Mr. Jay St. Clair
Mr. Ronald H. Kent, Jr.,
Bradley, Arant, Rose & White, LLP
One Federal Place
1819 5th Avenue North
Birmingham, Alabama 35203

This the _____ day of _____ 2003.

_____
OF COUNSEL

DEPOSITION OF LILLY LEDBETTER
pp. 31-33

A. Yes, sir. There were some other squads there that had moved on up prior to us, but we were one squad.

Q. Tell me who all was in your squad, Ms. Ledbetter.

A. Goodness. I can't remember Jerry's last name. Jerry was hired in from J. C. Penney company out of Chattanooga. Hew as an assistant store manager with him. And he works for the City of Gadsden now. He went to the tube plant.

Gary Howard, who was already – he was in accounting at Goodyear, and he took the manager's training position. He came out of IBM or accounting. And he went in truck and tractor, I believe.

And then there was a guy named Ray, and he had worked for Goodyear already, and he took – I believe he worked in shipping before. And I don't – I believe he went

in passenger tires, but I am not sure, I don't (begin p. 32) remember.

And Helen Black was already a good year union employee. She was the only union employee. And she went on the squad, and I don't remember what division she went in, I am sorry. But there were five divisions and five of us, and each one of us went in a different one.

Q. I got you.

A. I just know the important, I went to the radial plant.

Q. Yes, and I am just trying to get a picture of it in my mind. Did y'all hire in about the same time? Was the squad all hired the same day, for example, or just how –

A. We all became supervisor trainees at the same time and became supervisors at the same time.

Q. Okay. And did y'all stay together as a group during this about eight-month period?

A. Training? (begin p. 33)

Q. Yes, ma'am.

A. Yes, sir. And then we would report back for meetings periodically to see how our evaluations were coming on our work performance as a group and take tests.

Q. Was there sort of an internal competition between the five of y'all?

A. Definitely. Definitely.

Q. Do y'all have class reunions?

A. Well, most everybody has moved on. Jerry got laid off in 1985, and he went to work for the city and never came back. I can't remember his last name. He was a real sharp young man. And Gary, he was still working at the plant. He is – I understand has cancer right now, though, and he is very ill, but he is still working. And Helen, she went back in the union. She didn't stay on salary too many years.

Q. Do you know what she is doing now?

DEPOSITION OF LILLY LEDBETTER
pp. 120-123

Tucker -- he didn't call him by name, but he was your prior --

A. he said the evaluation. You know, the evaluation, according to what I had been told, was one of the better ones I had had. In fact, I got an eight percent raise.

Q. Let's talk about that. Do you remember the meeting that you had when you received that raise?

A. It was very short. Mike had overslept and was late that morning when he cam in, and he rushed it and it was probably approximately eight to ten minutes.

Q. Okay. Do you member anything about what was said during that meeting?

A. It was so rushed. And at the end I asked about a raise, and he said it would be very low because there hadn't been much money provided that year. And he had t leave at that time, so the next (begin p. 121) day I asked for another quick meeting with him to – I wanted to go back over some questions I had, what I could do to get my raise. I needed to earn an increase in pay. And what I could do, I wanted to get in line with where my peers were, because I told him at that time that I knew definitely that they were all making a

thousand at least more per month than I was and that I would like to get in line. Because I was still below the midpoint. I had never got the money up to reach the midpoint. And I felt like that I should be up in line with my peers, and I needed to know what I needed to do in order to achieve that.

Q. And that conversation happened when?

A. It was the next day after the initial evaluation. Because Mike didn't have time to stay and talk, and I didn't get to ask my questions.

Q. Okay, Well, are we talking (begin p. 122) about in 1995?

A. I believe that is correct.

Q. So when you had this conversation with Mike Tucker about the 1995 evaluation, you told him then that you wanted to try to get your pay more in line with your peers?

A. That's correct.

Q. How did you know what your peers were earning?

A. Different people that I worked for along the way had always told me that my pay was extremely low.

Q. And when you say people you worked for, you are talking abut your managers?

A. Yes. Kim Whitman had told me that.

Q. Okay. And did he tell you it (begin p. 123)was low in comparison to your peers?

A. Yes.

Q. And he was your manager in 1992?

A. Yes, sir.

Q. So you knew in 1992 that you were being paid less than your peers?

A. Yes, sir.

Q. And you knew that throughout 1993, 1994 and 1995?

A. I didn't know how much at that time.

Q. Yes, ma'am.

A. I didn't learn that until – how much difference until probably about 1994 and '95.

Q. And when you came to know in 1994 or 1995 exactly how much you were earning less than your peers, how did you come to know that?

A. Gosh, I don't remember. I don't really know. I don't really remember that.

DEPOSITION OF LILLY LEDBETTER
pp. 143-147

timely as they were supposed to be.

Q. What was the other one that you clearly remember when you were asked to sign it that it did not have the numerical rating completed on the last page?

A. I don't know which one. I just remember I signed one that didn't have anything written in it.

Q. While we are talking about this, let me make sure I understand the conversations that happened about your raise in connection with this. When you sat down with Mike Tucker and went over this performance evaluation marked as Defendant's Exhibit 2, did he tell you at that time what your raise would be?

A. No, sir, not exactly. No. the one that was rushed – again, I go back to this being dated '96 up here and this '95, but it was rushed. It was in '95 in reference to the '95 evaluation. It seems to me that when I went back for (begin p. 144) the second meeting with him, he told me six percent. But I actually received eight.

Q. when he told you six percent, did he say anything about that or explain whey that number was the one or give you any explanation for how that amount was determined?

A. Usually they always based in on the amount of money they said that had been provided to hem to distribute amongst their area managers.

Q. Yes ma'am, I understand that. But my question is do you member – and maybe you don't remember, and if you don't that is fine. But do you remember what Mike Tucker said to you about that raise? Did he say anything to you about how that amount was determined? I

am not asking you how it was normally done. I am asking do you remember what words came out of Mike Tucker's mouth?

A. No, sir, I do not remember (begin p. 145) exact words.

Q. do you remember – putting aside exact words, do you remember the substance of what was said?

A. No, sir, at this time I don't It might – I might remember later, but right now I don't remember what he said.

Q. Okay. And when it eventually turned out that your raise was higher than what he told you it was going to be, did you ever have any discussions with anyone at Goodyear management about that?

A. Well, I had talked to Mr. Tucker on several occasions about my money, because even with the eight percent, I still was not at midpoint. And the men – my peers were still getting their raises. So I could never catch up. And I explained that to him. There was no way I could ever catch up, there was no hope unless I could get some help along the way. And I felt somewhere that I had earned and

been -- and should (begin pl 146) be recognized that I could do that. And that is what I wanted. I needed that help. And I finally broke down and asked for it with it.

Q. And that is the conversations you had with Mike Tucker?

A. Because even with the eight percent, I was still behind.

Q. Right. You were earning less than your peers --

A. Right.

Q. -- the other area managers?

A. (Nodding head affirmatively.)

Q. Now, when you say your peers, to whom are you referring, what group of people?

A. the other – at that time tire room managers.

Q. Nto area managers throughout the whole plant? In your mind, your peers were the other tire room managers?

A. That's correct.

Q. And you knew that you were (begin p. 147) earning less than them?

A. Yes.

Q. And, in fact, you were talking to Mike Tucker about wanting to get your salary closer to theirs?

A. Right.

Q. and it happened that these other people who you describe as your peers – were they all men?

A. Uh-huh, yes. They were all men in the tire room. I was the only female. That was usually everywhere I worked, there was very few women.

Q. How frequently would you get a raise or were you eligible for a raise as an area manager?

MS. BULLOCK: Object to the form.

Q. I am just trying to understand was it done every year, first of January or –

A. Some people would receive raises more often than others. Mike

DEPOSITION OF LILLY LEDBETTER
pp. 278-280

A. Management trainees. And that was – I was not allowed to participate in that.

Q. Who stopped you from participating in that?

A. Mike Tucker.

Q. Tell me about that.

A. He said he didn't have anyone to put in my job to cover it.

Q. and you don't believe that was the real reason?

A. Well, they could – they would have done – or should have done like they have always done before, worked overtime. That is what they did in other areas where they used area managers.

Q. did you make it known that you wanted to be a part of this interviewing process?

A. I didn't ask for it, because I didn't have any idea that me being low seniority that I would be selected. But when I talked to Kelly Southworth in (begin p. 279)

reference – she was the EEO representative and among other thinks in that title. I went to her and talked to her about my low pay and what I would do to get it up. And I thought maybe by her being a female, she could tell me what I could do.

Q. When did you talk to Kelly?

A. It was while I was working for Mike tucker and I kept asking for raises and I wasn't getting anywhere. Mike was I believe my boss at the time. And I went over to talk to her and she said that she would do an investigation and get back with me. And about -- sometime alter, a month, or it was a long period, I ran into her one morning. And she said oh, I haven't completed that, I have been doing other things. And I said – she said but I will let you know when I complete it. And the next thing I knew, she was transferring out of Godsden, and I never heard anything from it.

(begin p. 280) But she tried – she then was putting this group of people together. And after having I guess talked to me, she put my name down. She put my

name on the list. And she did tell me that. She said I put your name on the list, but they wouldn't allow you – Mike Tucker would not – to participate. And then –

Q. Did you ever talk to Mike about that?

A. Mike talked to me, He told me I could not, and he sent me a memo and went over it too, he said to make sure that I understood that I have read it and that I would not be participating.

Q. Is that in these papers that –

A. I don't know. I don't know. I really don't know, sir, if I – I believe I did. I believe I turned that in. I don't know if it is here but – I believe that was some of the last papers I brought in this morning.

(6)

No. 05-1074

FILED
SEP 7 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

LILLY M. LEDBETTER,
Petitioner,

v.

GOODYEAR TIRE AND RUBBER COMPANY, INC.,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR THE PETITIONER

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September 7, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether and under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period.

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BRIEF FOR THE PETITIONER

Petitioner Lilly M. Ledbetter respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. App. 1a-37a) is published at 421 F.3d 1169. The district court's order and memorandum opinion on post-trial motions (Pet. App. 38a-42a) are unpublished. The district court's order on the objections to the magistrate judge's report and recommendation on respondent's motion for summary judgment (Pet. App. 43a-45a), and the report and recommendation itself (Pet. App. 46a-82a), are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2005. The court of appeals denied rehearing and rehearing en banc on October 26, 2005. Pet. App. 83a. Justice Kennedy extended the time to file the petition for certiorari until February 17, 2006. App. No. 05A633. This Court granted certiorari on June 26, 2006. The Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISION

42 U.S.C. 2000e-5(e)(1) provides, in relevant part:

"A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred * * * ."

STATEMENT

A jury found that at the time petitioner Lilly Ledbetter filed her charge of discrimination with the Equal Employment Opportunity Commission (EEOC), respondent Goodyear Tire and Rubber Company was paying petitioner less than her male counterparts because of her sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The district court agreed that this finding of fact was amply supported by the evidence at trial. The court of appeals nonetheless reversed the verdict because it concluded that petitioner was precluded from complaining about any present disparity in her pay that was the result of discriminatory decisions made more than 180 days before petitioner filed her EEOC charge (or, perhaps, the court held out, the most recent pay decision before the limitations period). Because the court believed that respondent's most recent pay decisions were nondiscriminatory, it held that Goodyear could not be held liable for continuing to pay petitioner less that her male colleagues for equal work even if the jury properly concluded that this disparity was the result of intentional sex discrimination.

1. Title VII prohibits discrimination "against any individual with respect to his compensation * * * because of such individual's race, color, religion, sex or national origin." 42 U.S.C. 2000e-2(a)(1). Under Section 706(e) of the Act, an individual must file a charge of discrimination with the EEOC "within one hundred and eighty days after the alleged unlawful employment practice occurred." 42 U.S.C. 2000e-5(e)(1).[1] If the EEOC dismisses the charge, or fails to file suit on behalf of the employee within certain time limits, the Commission "shall so notify the person aggrieved and within

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[1] If the employee files a charge of discrimination with a state agency with appropriate jurisdiction, the employee is allowed 300 days to file her charge with the EEOC. In all other circumstances, the time limit is 180 days. *Ibid.*

ninety days after the giving of such notice," the employee may bring a private civil action against the employer. *Id.* § 2000e-5(f)(1).

The charge-filing deadline of Section 706(e)(1) operates like a statute of limitations, precluding suit on any time-barred claim. *National Railroad Passenger Corporation* v. *Morgan*, 536 U.S. 101, 110 (2002) The time limit begins to run when the unlawful employment practice occurs. *Id.* at 111. When the unlawful employment practice is a "discrete" event – like a termination – the employee must file a charge within 180 or 300 days of that event. *Id.* at 114. If the employer engages in a series of recurring discrete violations, each violation gives rise to an independent claim and the limitations period begins anew with each recurring violation. *Ibid.* In *Bazemore* v. *Friday*, 478 U.S. 385, 395 (1986) (per curiam), this Court held that in the case of disparate pay claims, "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII * * *."

2. Because this case comes to the Court on review of a motion for judgment as a matter of law following a jury verdict, the facts must be construed as a reasonable jury could have found them, taking the evidence in the light most favorable to the plaintiff. *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000).

Petitioner was hired as a Production Supervisor at Goodyear Tire and Rubber's plant in Gadsden, Alabama, on February 5, 1979. Pet. App. 5a. At the time she was hired, petitioner had fifteen years of prior experience as a supervisor and sixty hours of credit toward her college degree. J.A. 33-34, 50. In 1985, petitioner qualified for the additional duties of the newly created position of "Area Manager," scoring second highest among the more than forty-five applicants. J.A. 34-36, 110. With the exception of brief periods during two general layoffs, petitioner worked as an Area Manager at the plant until January 1998, when she was transferred to a

position as a "Technology Engineer," performing manual labor on the production floor. Pet. App. 5a, 8a; J.A. 48-49. In November 1998, petitioner accepted an offer of early retirement. Pet. App. 9a.

On March 25, 1998, petitioner filed a charge of discrimination with the EEOC.[2] In addition to challenging the transfer, petitioner alleged that she was paid substantially less than her male counterparts for the same work because of her sex.[3] After receiving a right-to-sue letter, petitioner filed suit in the Northern District of Alabama.

a. At trial, petitioner presented pay records and testimony demonstrating that in 1997, she was the only woman working as an Area Manager and was paid less than men in the same position. Pet. App. 8a. Indeed, petitioner's salary was less than the *lowest paid* male in the same job and department, *ibid.*, and substantially less than men with equal or less seniority. J.A. 37-39, 69, 82, 93-95. The pay discrepancy between petitioner and her male counterparts ranged from fifteen to forty percent. Pet. App. 8a. Petitioner's pay was, in fact, so low that it sometimes fell below the minimum salary set by Goodyear's pay policy for her position. J.A. 95-96.

Goodyear did not contest at trial that petitioner was paid substantially less than men doing the same work at the

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[2] Petitioner initially made her allegations through an EEOC questionnaire, followed by a more formal document in July 1998. The parties and the court of appeals assumed for purposes of this appeal that the questionnaire constituted the relevant EEOC charge and that allegations in the formal charge related back to the original filing. Pet. App. 15a. Thus, the Court accepted that petitioner was entitled to challenge any discrimination occurring within 180 days of that date (*i.e.*, conduct after September 26, 1997). *Ibid.*

[3] She further brought claims under the Equal Pay Act (EPA), 29 U.S.C. 206(d), and the Age Discrimination In Employment Act (ADEA), 29 U.S.C. 621-34. Pet. App. 10a n.7. Those claims were resolved prior to trial and are not at issue here. *Ibid.*

factory. Instead, Goodyear asserted that petitioner was paid less as a result of the company's purportedly neutral merit system. Under that system, instituted in the early 1980s, employees received the same pay as the previous year, unless they were awarded a pay raise. See Pet. App. 4a-5a. The Business Center Manager made a recommendation about who should receive a raise and how much, purportedly in light of annual performance rankings based on certain production data, his subjective impressions of the employee's work, and reports by Performance Auditors. Pet. App. 4a; J.A. 78-82.

Under this system, petitioner was consistently given smaller raises than male Area Managers, or no raise at all. Pet. App. 5a-10a. Faced with the evidence of these disparities, Goodyear's witnesses testified that the difference in pay was due principally to petitioner's poor performance as reflected in what they described as her consistently low performance ranking. *Ibid.*

Petitioner challenged this explanation on three fronts.

First, petitioner presented evidence that Goodyear's description of the basis for her pay decisions was false. Petitioner testified that her performance rankings did not accurately reflect the true quality of her work, an assessment shared by another Area Manager who testified at trial and contemporaneous notes from her supervisors. See, *e.g.*, J.A. 43-46, 47, 60-62, 112-113. In fact, petitioner received a "Top Performance Award" in 1996, an award that Goodyear reserved for "individuals who have demonstrated, through value, added contributions that they are, in fact, the top performers in the company." J.A. 90.

Petitioner further testified that her evaluations were falsified. She explained that earlier in her career, her direct supervisor, Mike Maudsley, had threatened to give her poor evaluations if she did not succumb to his sexual advances. J.A. 39-40. Although petitioner was removed from Maudsley's supervision at the time, Maudsley was later assigned to evaluate petitioner's work once again, this time in

the role of Performance Auditor. Petitioner testified that in that role, Maudsley falsified her performance audits. J.A. 44-46. When she confronted him about the poor evaluations, he told her that it was "a lot easier to downgrade you. * * * You're just a little female and these big old guys, I mean, they're going to beat up on me and push me around and cuss me." J.A. 46. Petitioner further testified that Maudsley "continued to ask me out, go out with him. And I finally told him no. And then from that standpoint, my evaluations, the audits got worse." *Ibid.* Maudsley's audits were a principal basis for petitioner's performance evaluation in 1997, which led to the most recent raise denial. J.A. 77-82. However, even though Goodyear was required by law to preserve the audits pending the outcome of this litigation, see 29 C.F.R. 1602.14, the records were not preserved for the jury's inspection, J.A. 70-73.[4]

In addition, another of petitioner's former supervisors, Mike Tucker, testified that he did not in fact make his pay recommendations in accordance with Goodyear's purported policy. In attempting to explain the discrepancy between his assertion that petitioner was a consistently poor performer and his recommendation that she receive a "Top Performance Award" in 1996, Tucker asserted that he had violated company policy in giving her the award and that her performance that year was in fact substandard. He further denied having told petitioner that she earned the award because of her job performance, but later admitted that he had testified to the contrary in his deposition. J.A. 90-93.

Tucker further testified that Goodyear had not followed its pay policies setting minimum pay levels for petitioner's

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[4] The trial court accordingly instructed the jury that if it found that Goodyear violated Title VII's recordkeeping requirements, it could infer that "if the personnel records had been preserved they would have been beneficial to the plaintiff and not helpful to the defendant." J.A. 99.

position and that, in fact, petitioner's pay fell below that threshold for at least a year. J.A. 97-98.

Second, petitioner presented evidence of widespread discrimination against female managers at the Gadsden plant. Petitioner could recall only two other women who worked as Area Managers during her time at the plant, out of approximately eighty different people who held the position during her tenure. J.A. 36-37.[5] Two such female managers testified at trial, and each told the jury that she had been subject to discrimination at the plant and paid less than her male counterparts. Cathy Robertson was an Area Manager between 1993 and 1998. J.A. 51, 52-54. She testified that although she performed as well as the male managers, she was given low ratings because supervisors at the plant "didn't think [women] could do the job that the men could do." J.A. 55. She also testified that like petitioner, she was paid far less than her male colleagues, even those with less experience, and was also paid less than the minimum required by Goodyear's written policy for a time. J.A. 54-61. She concluded, based on her experiences, that the difference in pay was the result of her "[j]ust being a female in a man's world." J.A. 60.

Retha Burns worked as an Area Manager at the plant for eight years before transferring to a secretarial position because she had lost her childcare provider. J.A. 63, 65. Later, she testified, she was asked to return to the Area Manager position. However, Goodyear continued to pay her secretarial wages, leaving Burns with a lower salary than the men she was supervising. J.A. 65-66. At first, Burns's manager told her it was simply a matter of time until her salary would be raised "up to what the men were making." J.A. 66. After three-and-a-half months, however, Burns's

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[5] A third female manager, Retha Burns, testified at trial and one of petitioner's former supervisors, Jerry Jones, was able to name two others hired during his twenty-five years at the plant. J.A. 63, 83-86.

supervisor informed her that the best he could do was to offer her was a twenty percent raise from her secretarial salary, or $2,600 per month compared to the base salary of $3,600 per month established by Goodyear's policy for the position. J.A. 67-68. Burns refused to do the work of a Manager on a secretary's salary and accordingly transferred back to her secretarial position.

Third, the jury also heard direct evidence of discriminatory animus by plant officials towards petitioner herself. Petitioner testified that toward the end of her career, the Plant Manager told her that the "plant did not need women, that we didn't help it, we caused problems." J.A. 36.

Petitioner received similar comments from Jerry Jones, who worked in the personnel office at the time petitioner was harassed by Mike Maudsley, and who later became her direct supervisor from 1996 until October 1998. Pet. App. 7a-8a; J.A. 41-42. Petitioner testified that when she went to Jones seeking help to end the harassment by Maudsley and another employee, Jones "told me I was a troublemaker" and "said that these men had good careers at Goodyear and they were not going to dismiss them; and that Goodyear really didn't need troublemakers like me." J.A. 41-42. See also J.A. 50-51. In a later meeting, petitioner recalled, Jones said "that they would get rid of me." J.A. 42.

b. After the close of evidence, Goodyear moved for judgment as matter of law. J.A. 98. Goodyear asserted that an employee alleging disparate pay must file an EEOC charge within 180 days of the pay raise decision giving rise to the disparity. Under that theory, petitioner could prevail only by proving that her 1997 pay raise denial was discriminatory. And, Goodyear argued, petitioner failed to present sufficient evidence to sustain that claim. The district court denied the motion, J.A. 98, and, instead, instructed the jury that petitioner was required to "prove that each claim arose within six months of her filing a charge of discrimination with the EEOC." J.A. 99.

After deliberations, the jury returned a verdict in petitioner's favor on her discriminatory pay claims, finding it "more likely than not" that she had been paid "an unequal salary because of her sex." J.A. 102.[6] The jury awarded $223,776 in backpay, $4,662 for mental anguish, and $3,285,979 in punitive damages. Pet. App. 11a. The district court subsequently denied Goodyear's renewed motion for judgment as a matter of law but granted its motion for remittitur of backpay and punitive damages awards. Pet. App. 40a-42a. The court reduced the backpay award to $60,000, reflecting the discrepancy in pay between petitioner and a comparator from March 25, 1996 (two years before the filing of the EEOC charge) to November 1, 1998 (the date of petitioner's retirement). See Pet. App. 41a-42a.[7] The court further reduced the punitive damages award to $295,338 to bring the total award of punitive and compensatory damages within the limits imposed by 42 U.S.C. 1981a(b)(3)(D). Pet. App. 42a.

3. Goodyear appealed, arguing again that petitioner's claims were untimely to the extent they challenged pay disparities arising from decisions made outside the limitations period. The Eleventh Circuit reversed.

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[6] The jury ruled in Goodyear's favor on the transfer-related claims. Pet. App. 10a & n.7.

[7] The petition erroneously stated that petitioner sought only backpay for the period beginning 180 days before she filed her EEOC charge. Pet. 3. In fact, while the jury was instructed that damages could only be imposed for the period "beginning six months from the day that she filed her EEOC questionnaire," J.A. 100, in response to Goodyear's motion for remittitur, petitioner argued, and the district court agreed, that the backpay award was governed by Section 706(g)(1), which provides that "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission." 42 U.S.C. 2000e-5(g)(1).

The court recognized that under this Court's decision in *Morgan*, "each discrete discriminatory act starts a new clock for filing charges alleging that act." Pet. App. 16a (quoting *Morgan*, 536 U.S. at 113). The court further concluded that disparate pay cases, unlike hostile work environment claims, involve just such "discrete acts." *Id.* 18a.

The court then observed that it was "undisputed that Ledbetter's claim is not entirely time barred" because "an affirmative decision directly affecting Ledbetter's pay was made within the limitations period * * * ." Pet. App. 19a. Whether petitioner should be allowed to challenge any disparity in her pay that arose from earlier decisions, the court concluded, was a harder question. *Id.* 20a. The court acknowledged that the vast majority of circuits – including "at least the Third, Fourth, Sixth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits," *id.* 20a n.17 – had long relied on this Court's decision in *Bazemore* in holding that "a Title VII claim challenging an employee's pay was not time-barred so long as the plaintiff received within the limitations period at least one paycheck implementing the pay rate the employee challenged as unlawful." Pet. App. 20a. Although *Morgan* itself relied on *Bazemore*, see 536 U.S. at 111-12, the Eleventh Circuit nonetheless questioned whether the decisions following *Bazemore* "survive *Morgan*." Pet. App. 22a. But the court ultimately decided that the question was beside the point. Those cases, it concluded, "do not speak to how far back in time the plaintiff may reach in looking for the intentionally discriminatory act that is the central, requisite element of every successful disparate treatment claim." *Id.* 22a-23a. The court recognized that "the necessary implication of these cases is that a plaintiff whose claim is preserved by the continued issuance of improperly low paychecks can look some distance back in time for the underlying, intentionally discriminatory decision." *Id.* 23a. "There must, however, be some limit on how far back the plaintiff can reach." *Ibid.*

Finding no such limitation in the text of Title VII, or in the decisions of this or any other court, the Eleventh Circuit proceeded to write its own: "at least in cases in which the employer has a system for periodically reviewing and re-establishing employee pay, an employee seeking to establish that his or her pay level was unlawfully depressed may look no further into the past than the last affirmative decision directly affecting the employee's pay immediately preceding the start of the limitations period." Pet. App. 24a.

Applying its new rule, the court of appeals examined petitioner's last two pay raise decisions to determine "whether Ledbetter presented sufficient evidence for a reasonable jury to conclude that either of these decisions violated Title VII." Pet. App. 28a. The court began by concluding that there was "no evidence produced at trial" to show that the denial of a pay raise in 1998 was discriminatory. Pet. App. 31a. The court acknowledged that the pay recommendation was made by a new supervisor, Kelly Owen, who had no direct knowledge of petitioner's performance and therefore had to rely on the performance audits produced by Mike Maudsley, the supervisor who had previously sexually harassed petitioner and who had admitted to falsifying petitioner's audits. Pet. App. 31a & n.21. The court ignored the fact that Goodyear had illegally failed to preserve the audit reports, see J.A. 70-76, and held that Owen's reliance on the missing audits – which of course the jury was unable to see – was an absolute defense to liability, explaining that it "is not discriminatory to honestly rely on inaccurate information." Pet. App. 31a-32a n.21.

The court next found that the evidence conclusively demonstrated that the reason petitioner was denied a raise in 1997 was because she was scheduled to be laid off due to a reduction in force. Pet. App. 32a The court acknowledged that the principal evidence supporting this explanation was the testimony of Jerry Jones, *ibid.*, the supervisor who previously told petitioner she "was a troublemaker" and that Goodyear "would get rid of [her]." J.A 42. The court also

recognized that petitioner was never actually laid off, and that the day after Jones told petitioner she was going to be laid off, he returned to tell her that she would continue working after all. Pet. App. 7a. The court nonetheless held that the jury was required to believe Jones's testimony that the asserted impending layoff was the real reason she was denied a raise that year. *Id.* 32a. The court also rejected petitioner's claim that the jury could have concluded that even if she were actually slated for layoff, it was because of her sex. *Id.* 33a-37a.

Having decided that the jury could not have found petitioner's most recent pay raise decisions discriminatory, the court of appeals looked no further. "Because she failed to carry her burden of coming forward with sufficient evidence to permit a reasonable jury to find that either of those decisions was a pretext for sexual discrimination, the district court should have granted Goodyear judgment as a matter of law." Pet. App. 37a.

4. The EEOC filed an *amicus* brief supporting petitioner's petition for rehearing en banc, arguing that "the principles enunciated by the Supreme Court in *Bazemore* are still applicable after *Morgan*," and that, "[u]nder these principles, each paycheck Ledbetter received that was lower than it otherwise would have been because of her sex is a 'wrong actionable under Title VII,' even if the sex-based disparity was caused by decision made years earlier." Br. 9. The petition for rehearing was nevertheless denied on October 26, 2005. Pet. App. 83a.

5. This court granted certiorari on June 26, 2006.

SUMMARY OF THE ARGUMENT

In *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101 (2002), this Court held that recurring violations of Title VII are separately actionable and that a new limitations period arises for each repetition of an unlawful employment practice. In illustrating this principle, the Court gave the example of a disparate pay case, pointing to the Court's prior decision in *Bazemore* v. *Friday*, 478 U.S. 385 (1986). That case held that an employer commits a discrete violation of Title VII each and every time it pays similarly situated employees differently for a discriminatory reason prohibited by the statute. *Bazemore* further held that the violation recurred with each disparate paycheck even if the disparity arose out of discriminatory pay decisions made years earlier, even before the effective date of the Act.

Together, *Morgan* and *Bazemore* establish the timely filing requirements for disparate pay claims under Title VII: each paycheck that offers a woman less pay than a similarly situated man because of her sex is a separate violation of Title VII with its own limitations period, regardless of whether the paycheck simply implements a prior discriminatory decision made outside the limitations period. This is the established view of the vast majority of courts of appeals and of the EEOC, whose reasonable and well-supported interpretation of Title VII's limitations provision is entitled to deference. This interpretation is consistent with the approach across a wide variety of statutory and common-law claims: recurring payments give rise to recurring causes of action under the Equal Pay Act, the Fair Labor Standards Act, the common law of contracts, and in a range of other analogous contexts. Finally, the *Morgan/Bazemore* rule is consistent with this Court's anti-discrimination precedent more generally: the Court has long proceeded on the basis that an intentionally discriminatory decision gives rise to new violations of civil rights statutes or the federal Constitution each time it is implemented to cause a new injury. Having enacted and

amended Title VII's limitations provision against this legal background, Congress is presumed to have intended that the principle applied in *Bazemore* would continue to be applied in disparate pay cases unless and until Congress provides otherwise.

The Eleventh Circuit's contrary rule is entirely at odds with the most basic purposes of Title VII. Under the court of appeals' rule, an employee is condemned to perpetually unequal pay for equal work unless she recognizes and complains about the discrimination within a few short months after it first begins. Such forfeitures are likely to be frequent. Unlike other adverse employment actions, discrimination in pay generally occurs in small increments and in a context where grounds for suspicion develop only over time. Workers rarely know in detail how much their colleagues are paid, much less the basis for any disparities they may discover. Even when such information is available, small initial discrepancies may not be worth fighting over, particularly for new employees or those – like petitioner – trying to fit in a non-traditional environment. It is often only when the discrimination manifests in other ways, or when the disparity is magnified (*e.g.*, through future raises calculated as a percentage of current salary), that an employee is likely to complain. A worker's desire to give her employer an initial benefit of the doubt should not preclude her from later challenging the continued payment of an intentionally discriminatory wage.

This does not mean that victims of discrimination may delay bringing charges of pay discrimination indefinitely. *Morgan* established that employers are protected against undue prejudicial delay by the doctrine of laches. And even when that doctrine is inapplicable, delay may preclude a plaintiff from bearing her burden of establishing that the present disparity in pay is the result of intentional discrimination. Moreover, employers are protected against large backpay awards by statutory limits on available remedies.

The court of appeals' unprecedented departure from the rule this Court established in *Bazemore* and reaffirmed in *Morgan* upsets that carefully balanced accommodation of congressional interests. That balance should be restored and the judgment below reversed.

ARGUMENT

As this case comes to the Court, there is no dispute that Goodyear paid petitioner substantially less money for equal work simply because she was a woman. It is further undisputed that she received this discriminatory pay within 180 days of filing her charge of discrimination with the EEOC. The question here is whether such discrimination is immune from challenge, and may be continued in perpetuity, unless the employee can prove that the disparity arose from a discriminatory pay-setting decision made within (or immediately prior to) Title VII's statutory limitations period. This Court has already answered that question. For more than two decades, the Court has held that each discriminatory paycheck constitutes a separate violation of Title VII, giving rise to its own limitations period. While delay in challenging discriminatory pay may disadvantage an employee – making her burden of proving intentional discrimination more difficult, potentially precluding a full recovery of backpay for paychecks issued before the limitations period, or possibly leading to a successful invocation of a laches defense – the delay does not forfeit the worker's right to the most basic guarantees of equal employment opportunities under Title VII.

I. Discriminatory Pay Raise Decisions Give Rise To Recurring Violations Of Title VII As The Decisions Are Implemented Through Periodic Paychecks.

Section 706(e)(1) of Title VII provides that a "charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred.'" 42 U.S.C. 2000e-5(e)(1). In *National Railroad*

Passenger Corp. v. *Morgan*, 536 U.S. 101 (2002), this Court held that recurring violations of Title VII give rise to recurring claims and a new limitations periods under Section 706(e)(1) with every repetition of the violation. In *Bazemore* v. *Friday*, 478 U.S. 385 (1986), this Court held that in a disparate pay case, each discriminatory paycheck constitutes an independent unlawful employment practice in violation of Title VII, even if it simply implements a discriminatory pay decision made outside the limitations period. Together, these cases resolve the question presented here and require reversal of the Eleventh Circuit's decision in this case.

A. Under *National Railroad Passenger Corp.* v. *Morgan*, A Title VII Plaintiff May Challenge Any Discrete Unlawful Employment Practice Occurring During The Limitations Period.

In *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101 (2002), this Court considered how Section 706(e)(1) applies to recurring or related violations of the Title VII. The Court rejected a version of the "continuing violations doctrine" under which "so long as one act falls within the charge filing period, discriminatory or retaliatory acts that are plausibly or sufficiently related to that act may also be considered for the purposes of liability." *Id.* at 114. Instead, the Court held that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Id.* at 113.[8] Rather, "[e]ach discrete discriminatory act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed within the 180- or 300-day time period after the discrete discriminatory act occurred." *Ibid.* At the same time, the Court also rejected the view that an employee must challenge the first instance of a recurring violation or forfeit the right to

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[8] The Court ruled that "[h]ostile environment claims are different in kind from discrete acts," and accordingly are subject to different rules. 536 U.S. at 115.

challenge its repetition in the future. "The existence of past acts and the employee's prior knowledge of their occurrence," the Court held, "does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed." *Ibid.*.

Accordingly, recurring violations[9] of Title VII give rise to recurring claims, each with its own limitations period. A plaintiff may challenge the discrete violations occurring within 180 or 300 days of her EEOC charge, even if she had not previously (and could not now) complain of violations occurring outside the limitations period.

The Court in *Morgan* acknowledged that, applied inflexibly, such time requirements could sometimes lead to unfair results. But that risk, the Court explained, was mitigated by the availability of equitable doctrines designed to protect the legitimate interests of employees and employers alike. Thus, workers are protected by "equitable doctrines such as tolling or estoppel." 536 U.S. at 113. "Courts may evaluate whether it would be proper to apply such doctrines, although they are to be applied sparingly." *Ibid.* At the same time, *Morgan* did "not leave employers defenseless against employees who bring * * * claims that extend over long periods of time." 536 U.S. at 121. "Employers have recourse when a plaintiff unreasonably delays filing a charge," and may, for example, "raise a laches defense, which bars a plaintiff from maintaining a suit if he unreasonably delays in filing a suit and as a result harms the defendant." *Ibid.*

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[9] The phrase "continuing violation" is used variously in the lower courts, sometimes to refer to the theory rejected in *Morgan*, and sometimes to refer to the theory of recurring violations *Morgan* embraced. To avoid confusion, this brief uses the term "recurring violation" to refer to a series of repeated discrete acts, each of which gives rise to a new claim with its own limitations period.

B. Under *Bazemore* v. *Friday*, Each Disparate Paycheck Constitutes A Separate Violation Of Title VII.

Under *Morgan*, the "critical questions, then, are: What constitutes an 'unlawful employment practice' and when has that practice 'occurred'?" See 536 U.S. at 110. If the unlawful employment practice in a disparate pay case is the pay-setting *decision* (and only that decision), then the violation occurs at the time of that decision and the limitations period runs from that date. Under that view, petitioner may prevail only by showing that Goodyear's pay raise decision in 1998 was illegal. If, on the other hand, the unlawful employment practice is the actual *payment* of the disparate wage because of sex (or if the disparate pay constitutes an additional violation), then each discriminatory paycheck constitutes a new discrete unlawful employment practice with its own limitations period. And under this view, petitioner was entitled to challenge each of the disparate paychecks she received within 180 days of her EEOC charge.

This Court chose between those competing conceptions of disparate pay violations in *Bazemore* v. *Friday*, 478 U.S. 385 (1986), adopting the latter view and treating each paycheck as a discrete, actionable event.

1. The plaintiffs in *Bazemore* brought suit to challenge pay disparities between black and white employees in the North Carolina Agricultural Extension Service. Prior to 1965, the Extension Service was segregated into a white and a "Negro branch." 478 U.S. at 390. While salaries varied widely among different employees and different county offices, it was undisputed that under this segregated system, the Extension Service "paid black employees less than white employees." *Id.* at 394. The branches were integrated on August 1, 1965, but this "did not result immediately in the elimination of some disparities which had existed between the salaries of white personnel and black personnel." *Id.* at 391 (citation omitted). Instead, the prior discriminatory salaries

were continued, subject to periodic adjustments through marginal pay raises that were based on a number of assertedly non-discriminatory factors, including a system of annual performance reviews. See *id.* at 397 & n7; see also *Bazemore* v. *Friday*, 751 F.2d 662, 666-67 (CA4 1984) (describing how merit raises were based on a "quartile system" under which "each employee is placed in one of four quartile groups annually by the District Extension Chairman" based "upon an evaluation of the employee, using the Performance Review Guide"). As a result, the pay disparities "continued after Title VII became applicable to the Extension Service in March 1972." 478 U.S. at 394.

The court of appeals in *Bazemore* held that the plaintiffs could prove a violation of Title VII only if they could establish that the present disparity in their pay arose solely from pay decisions made after the effective date of the 1972 amendments. 751 F.2d at 670. The court concluded that any continuing disparity that was the result of pay decisions pre-dating the Amendments was simply a continuing *effect* of the prior unchallengeable decisions, not a present recurring *violation*. *Ibid.*

In making that distinction, the Fourth Circuit relied on this Court's decision in *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977). The plaintiff in *Evans* was an airline employee who had been unlawfully terminated when she became pregnant, but failed to file an EEOC charge until years later, when she was rehired but not given seniority credit for her prior years of service. *Id.* at 555-56. This Court held that her challenge to the seniority decision failed because similarly situated men and women were treated the same (no one with an interruption in service was given credit for prior work for the airline). *Id.* at 558-59. The Court further held that the plaintiff could not rescue her timely but meritless claim by asserting that the denial of seniority credit was the indirect result of the prior discriminatory termination. "A discriminatory act which is not made the basis of a timely charge is the legal equivalent of a discriminatory act which

occurred before the statute was passed." *Id.* at 558. It was not enough, the Court held, that the "seniority system gives present effect to a past act of discrimination." *Ibid.* The "critical question is whether any present *violation* exists." *Ibid.* (emphasis in original). See also *Delaware State College* v. *Ricks*, 449 U.S. 250, 257 (1980) (same).

The Fourth Circuit in *Bazemore* read *Evans* to establish that the defendants had no obligation to eliminate current disparities in pay that were the result of "pre-Act discriminatory differences in salaries." 751 F.2d at 670. Accordingly, the court held, the plaintiffs could recover only if they could prove that the present disparities in their pay were the result of post-enactment discriminatory pay raise decisions. *Ibid.* This Court disagreed:

> The error of the Court of Appeals with respect to salary disparities created prior to 1972 and perpetuated thereafter is too obvious to warrant extended discussion: that the Extension Service discriminated with respect to salaries *prior* to the time it was covered by Title VII does not excuse perpetuating that discrimination *after* the Extension Service became covered by Title VII. * * * [T]o the extent an employer continued to engage in that act or practice, it is liable under that statute. * * * Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII. The Court of Appeals plainly erred in holding that the pre-Act discriminatory differences in salaries did not have to be eliminated.

478 U.S. at 395-96 (emphasis in original).

The Court then explained why the Fourth Circuit's reliance on *Evans* was misplaced:

> Because the employer was not engaged in discriminatory practices at the time the respondent in

> *Evans* brought suit, there simply was no violation of Title VII. * * * *
>
> Here, however, petitioners are alleging that in continuing to pay blacks less than similarly situated whites, respondents have *not* from the date of the Act forward 'made all [their] employment decisions in a wholly nondiscriminatory way.' Our holding in no sense gives legal effect to the pre-1972 actions, but, consistent with *Evans* * * * focuses on the present salary structure, which is illegal if it is a mere continuation of the pre-1965 discriminatory pay structure.

Id. at 396 n.6 (citations omitted).

2. *Bazemore* thus answers the twin questions of *Morgan* and, in the process, resolves the question presented by this case.

First, *Bazemore* defines the "unlawful employment practice" in a disparate pay case as the payment of unequal wages to similarly situated workers because of the plaintiff's race or sex. That act is unlawful even if the disparity arises from decisions made outside the limitations period, or even before the effective date of the Act, because the perpetuation of a prior intentional pay disparity is, in itself, a violation of Title VII. 478 U.S. at 395. Put another way, employers have a continuing obligation to eliminate pay disparities arising from intentionally discriminatory pay decisions. *Id.* at 396. Each paycheck issued in violation of that obligation constitutes a new unlawful employment practice. This is true even if some portion of the pay differential is the result of non-discriminatory pay raise decisions, as was alleged in *Bazemore*. The employer still has the obligation to eliminate the portion of the disparity that *is* the result of unlawful discrimination. *Id.* at 394-95.

Second, under *Bazemore*, the "unlawful employment practice" occurs with the delivery of each intentionally disparate paycheck, giving rise to recurring violations each

pay period during which the disparity is perpetuated. *Id.* at 395-96. Indeed, this Court in *Morgan* specifically cited *Bazemore* as a quintessential example of a case involving recurring discrete violations of Title VII, each of which gives rise to its own limitations period. See 536 U.S. at 111-12.

Accordingly, in this case, petitioner was entitled to challenge the discriminatory pay she received beginning 180 days prior to the filing of her EEOC charge. Moreover, the jury was entitled to find the pay disparity during this period unlawful so long as any portion of the disparity arose from an intentionally discriminatory pay decision, even if the two most recent pay raise decisions simply perpetuated, rather than compounded, prior intentional pay disparities. See 478 U.S. at 394-95. Just as the Fourth Circuit erred in *Bazemore* in restricting the search for discriminatory intent to the post-Act pay raise decisions, so too the Eleventh Circuit erred in this case in limiting its review of the sufficiency of the evidence to the pay raise decisions occurring during (or just prior to) the limitations period.

II. The Rule Of *Morgan* And *Bazemore* Comports With The Language And Purposes Of Title VII.

The traditional rule of *Morgan* and *Bazemore* faithfully implements the requirements of Title VII's timely filing requirement while at the same time striking a reasonable balance between the interests of employers and the principal purposes of Title VII's anti-discrimination mandate.

The Court's decision in *Bazemore* followed from the plain text of Title VII itself, which prohibits "discriminat[ion] against any individual with respect to his compensation." 42 U.S.C. 2000e-2(a)(1). The most natural reading of this language is that Congress intended to prohibit the actual payment of disparate wages on the basis of sex or race, not simply the decision to pay a disparate wage. That is, Title VII prohibits discrimination "with respect to * * * compensation,"

ibid., not with respect to "compensation *decisions*."[10] It would be passing strange, for example, to conclude that an employer had engaged in unlawful discrimination "with respect to * * * compensation" if he decided to pay a worker a lower wage because of her sex, but then accidentally paid her the same as everyone else. Although the employer's unexecuted decision may be worthy of contempt, Title VII did not establish a "general civility code for the American workplace." *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998). Rather, "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971) (emphasis added). Indeed, it is clear that one of the principal harms Congress intended Title VII to address was the economic harm – and the resulting social effects – from discrimination in pay. See, *e.g.*, *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747 (1976) (noting that the legislative history of the 1972 Amendments to Title VII expressed "an explicit concern with the 'earnings gap' presently existing between black and white employees in American society") (citing S. Rep. No. 92-415, at 6 (1971)).

Thus, while it is true that Congress hoped to encourage voluntary compliance and to avoid needless litigation, see *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742, 764

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[10] Even if the relevant "unlawful employment practice" were a pay "decision," rather than the payment of an unequal wage for a discriminatory reason, petitioner would still be entitled to prevail. First, every week's paycheck constitutes a decision by the employer to pay its employee a particular amount for the work she performed that pay period. A pay decision that carries forward a prior unlawful disparity is, itself, a violation of Title VII. See *Bazemore*, 478 U.S. at 397. Second, even if the only cognizable "decision" were the employer's periodic decision setting a worker's salary level, at least one such decision was made during the limitations period in this case. Pet. App. 19a. That decision also violated the employer's obligation to ensure that "discriminatory differences in salaries [are] eliminated." *Bazemore*, 478 U.S. at 397.

(1998), "the purpose of Title VII" nonetheless is to "make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975); see also *Burlington N. & Santa Fe Ry. Co.* v. *White*, 126 S. Ct. 2405, 2417 (2006). "We must therefore avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate." *County of Washington* v. *Gunther*, 452 U.S. 161, 178 (1981).

The *Bazemore* rule is faithful to these purposes, precluding an employer from permanently freezing in place a discriminatory salary level and ensuring that so long as an individual is subject to continuing disparate pay because of her sex or race, the law affords continuing access to a remedy. To be sure, delay may affect the nature and extent of the remedy available,[11] but *Bazemore* ensures that, at a minimum,

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[11] Some courts have held that backpay is limited to the disparity in pay received during the limitations period. See Pet. App. 24a-25a n.18 (Eleventh Circuit stating, in dicta, that "the employee is limited to recovering for those paychecks received within the limitations period") (collecting cases). Others, including the district court below, have read Section 706(g)(1) to permit recovery of two years' backpay. See 42 U.S.C. 2000e-5(g)(1) ("Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission."); Pet. App. 41a; Brief of National Partnership for Women and Families et al. (NPWF Br.) § III(B) (collecting cases). Members of this Court have previously noted the tension between Section 706(g)(1) and Section 706(a). Compare *Morgan*, 536 U.S. at 119 ("Morgan correctly notes that the timeliness requirement does not dictate the amount of recoverable damages. * * * If Congress intended to limit liability for conduct occurring in the period within which the party must file the charge, it seems unlikely that Congress would have allowed recovery for two years of backpay.") with *id.* at 126 (O'Connor, J., concurring in part and dissenting in part). This Court need not, however, resolve that tension in this case. The court of appeals held that petitioner failed to prove a violation of

an employee will generally be able to obtain prospective injunctive relief to end the ongoing violation of her Title VII rights.

On the other hand, under the Eleventh Circuit rule, if the employee fails to complain about a pay raise decision within six months, she may never seek even prospective relief and must quit her job and find a new one in order to regain an enforceable right to equal pay for equal work. A survey of the cases illustrates that this risk is predictably very real. See cases cited in Section III(A), *infra*. For example, many of the post-*Bazemore* cases involve discrimination in the assignment of an employee's initial salary.[12] It is not surprising that few employees are willing to begin their first six months of employment by filing a charge of discrimination with the EEOC. New employees may be grateful just to have a job, are likely to have less support from their new co-workers, and may be especially vulnerable to retaliation. See NPWF Br. § II(A)(2). One might hope that an employee would nonetheless quickly challenge the unlawful conduct of her employer, but her understandable reluctance to do so should not condemn the employee to a career as a second-class employee, particularly when the employer is unable to show that the delay in filing the charge caused any prejudice.

The impediments to challenging employment decisions also can exist long after the initial hiring, particularly in cases such as this. Petitioner spent her career as one of only a very few women attempting to prove herself in a non-traditional setting. While the reluctance to rock the boat may be

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Title VII. Pet. App. 37a. The Question Presented challenges only that liability decision, and does not encompass any question relating to the appropriate remedy should the jury's verdict on liability be reinstated.

[12] See, *e.g.*, *Shea* v. *Rice*, 409 F.3d 448, 449-50 (CADC 2005); *Goodwin* v. *Gen.l Motors Corp.*, 275 F.3d 1005, 1008 (CA10 2002); *Calloway* v. *Partners Nat'l Health Plans*, 986 F.2d 446 (CA11 1993).

overcome in the face of serious and immediate violations, the slow accumulation of harm from attendant pay discrimination presents a special risk that the Eleventh Circuit's rule will lead to the forfeiture of important federal rights.

Moreover, some delay in bringing disparate pay claims can be expected due simply to the lack of information about the pay received by fellow employees and the justification for any disparities. Simply being denied a raise is no ground for filing an EEOC charge and it is not uncommon for employee pay levels to be kept confidential or for workers to be reluctant to share salary information with each other. See, *e.g.*, L. Bierman & R. Gely, *"Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167, 168, 171 (2004). In this case, for example, Area Manager Robertson testified that she had no access to information regarding what others were being paid. J.A. 56-57; see also J.A. 89 (Goodyear manager testifying that pay raise allocation tables were "confidential documents, documents that always should be locked up"). The problem is particularly acute when the disparity arises not because the plaintiff is denied a raise but because her male counterparts are given *larger* raises, or because a later-hired male is given a higher starting salary. See, *e.g.*, *EEOC* v. *Penton Indus. Publ'g Co.*, 851 F.2d 835, 835-36 (CA6 1988) (disparity arose when employer hired male to same position as two existing female employees with equal qualifications, but paid the male substantially more).

In such cases, the plaintiff will have little reason even to suspect discrimination. And even when an employee knows she is being paid less than others, she may presume, at least initially, that there is a nondiscriminatory explanation, particularly where, as in this case, the employer uses a purportedly neutral merit system for setting wages. See generally NPWF Br. § II(A). The disparity often arises not from an employer's express or obvious campaign to discriminate, but from subtle biases that affect the discretionary aspects of pay decisions, including evaluations

of worker performance and relative merit. Cf. *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 736 (2003) (noting Congress's recognition of "subtle [sex] discrimination [in employment] that may be difficult to detect on a case-by-case basis"). And as a result, the unlawful discrimination takes its toll at the margins with accumulating effects that become visible, and then suspicious, only with time. It is often only after further information is revealed, or the disparity persists or increases, that an employee will come to suspect illegal conduct. It is to be expected, therefore, that 180 or 300 days will often pass before an employee has any reasonable basis for challenging a pay raise decision.[13]

It is true that an employee may avoid some of these hazards by immediately filing an EEOC charge after each pay decision she has the slightest reason to believe may reflect illegal discrimination. Indeed, the Eleventh Circuit rule creates an incentive to do so, to the detriment of both employers and the EEOC. But that result is inconsistent with Congress's intent that resort to the EEOC process and litigation should be a last resort, not the first. Cf. *EEOC* v. *Assoc. Dry Goods Corp.*, 449 U.S. 590, 602 (1981) (rejecting

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[13] This concern could be blunted to some extent by the application of a discovery rule, tolling the limitations period until the employee had notice of sufficient facts to give rise to a reasonable belief that the employment action was discriminatory. But this Court has not yet recognized *any* discovery rule under Title VII, much less one calibrated to the discovery of how much other workers are paid. See *Morgan*, 536 U.S. at 115 n.7 (noting, but not resolving, question "whether the time begins to run when the injury occurs as opposed to when the injury reasonably should have been discovered"). Compare also *id.* at 123-24 (O'Connor, J., concurring in part and dissenting in part, joined only by Justice Breyer) (expressing view that "some version of the discovery rule applies to discrete-act claims") with *TRW Inc.* v. *Andrews*, 534 U.S. 19, 37 (2001) (Scalia, J., concurring, joined by Justice Thomas) (calling the "injury-discovery rule * * * [a] bad wine of recent vintage"). See also NPWF Br. § 2(A)(3).

interpretation under which "a charging party would have to file suit in a hopeless case in order to discover that the case was hopeless"). Absent the Eleventh Circuit's rule, many workers would be willing to wait to see if further experience allays their suspicion or if future raises reduce the suspect disparity, ultimately avoiding many pay disputes. *Bazemore* thus provides a legal environment that permits employees to give their employers an initial benefit of the doubt.

Of course, Congress also intended to discourage employees from waiting too long to bring well-founded charges of discrimination to the attention of the EEOC and the courts. The rule of *Morgan* and *Bazemore* implements this purpose as well, adequately protecting employers' interest in avoiding stale claims. As already noted, defendants who are actually prejudiced by an unjustified delay may raise a laches defense. See *Morgan*, 536 U.S. at 121. The only difference between this defense and the one Goodyear seeks is that laches precludes the redress of ongoing discrimination only when preclusion is necessary to protect an employer from prejudice.

There is good reason to think that such prejudice is, in fact, rare in disparate pay cases. As a matter of both practice and legal obligation, employers generally document the basis of pay decisions and retain those records for years.[14] Indeed, courts routinely hear pay-related claims under other statutes

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[14] The regulations promulgated under Title VII, for example, require employers to retain personnel records for one year, or until the final disposition of a charge of discrimination to which the records are relevant. See 29 C.F.R. 1602.14. The Equal Pay Act regulations require the retention of wage rate information for two years, while the Fair Labor Standards Act requires employers to keep payroll records for three years. See *id.* § 1620.32(c) (Equal Pay Act); *id.* § 516.5(a) (FLSA). See also *id.* § 1627.3(a) (ADEA requires retention of basic wage records for three years); *id.* § 1627.3(b)(2) (written description of merit system must be kept on file while system is in place, and for one year after its termination).

with two- or three-year limitations periods, with no indication that such delay unfairly prejudices defendants.[15] Moreover, employees have substantial incentives to avoid unwarranted delay. In addition to the risk of evoking a laches defense, delay may make it more difficult for the plaintiff to sustain her burden of persuasion, including the burden of rebutting an employer's proffered non-discriminatory explanation for a pay disparity. See, *e.g.*, *Reeves*, 530 U.S. at 143. And after a certain point, every day of delay costs the plaintiff a day's worth of potential backpay. See *supra* at 24 & n.11. Thus, as a practical matter, workers have little to gain, and much to lose, through undue delay. At the same time, permitting a plaintiff to challenge continuing pay discrimination when the defendant cannot show prejudice from delay furthers the fundamental purposes of Title VII.

III. The Rule Of *Morgan* And *Bazemore* Is Consistent With A Wide Array Of Long-Standing Authority.

A. Courts Of Appeals Have Applied *Bazemore* To Disparate Pay Cases For More Than Two Decades.

Both before and after *Morgan*, the vast majority of the courts of appeals – including, until this case, the Eleventh Circuit – have understood *Bazemore* to establish that a plaintiff may raise a disparate pay claim to challenge each discriminatory paycheck received during the limitations period.[16] Indeed, the rule of *Bazemore* was well-established

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[15] Minimum wage and overtime claims under the FLSA, as well as Equal Pay Act claims, are subject to a two-year statute of limitations, extended to three years for willful violations. See 29 U.S.C. 206(d)(3), 255. A worker charging racial discrimination in employment may file a claim under 42 U.S.C 1981 up to four or more years after the violation has occurred. See 28 U.S.C. 1658; *Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004).

[16] See *Wedow* v. *City of Kansas City*, 442 F.3d 661, 671 (CA8 2006) (interpreting *Bazemore* as establishing that "each week's

paycheck that delivers less on a discriminatory basis is a separate Title VII violation"); *Forsyth* v. *Federation Employment & Guidance Serv.*, 409 F.3d 565, 573 (CA2 2005) ("[E]very paycheck stemming from a discriminatory pay scale is an actionable discrete discriminatory act."); *Shea* v. *Rice*, 409 F.3d 448, 452 (CADC 2005) ("[An] employer commit[s] a separate unlawful employment practice each time he pa[ys] one employee less than another for a discriminatory reason.") (citing *Bazemore*); *Goodwin* v. *Gen. Motors Corp.*, 275 F.3d 1005, 1009 (CA10 2002) ("But [*Bazemore*] has taught a crucial distinction with respect to discriminatory disparities in pay, establishing that a discriminatory salary is not merely a lingering effect of past discrimination – instead it is itself a continually recurring violation."); *Anderson* v. *Zubieta*, 180 F.3d 329, 335 (CADC 1999) ("The plaintiffs respond that their complaints allege continuing violations of Title VII, actionable upon receipt of each paycheck. We agree. * * * The Courts of Appeals have repeatedly reached the same conclusion.") (citing *Bazemore* and collecting court of appeals cases); *Ashley* v. *Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 167-68 (CA8 1995) (en banc) ("Ashley's Title VII pay claim is timely because she received allegedly discriminatory paychecks within 300 days prior to the filing of her administrative charge.") (citing *Bazemore*); *Brinkley-Obu* v. *Hughes Training, Inc.*, 36 F.3d 336, 349 (CA4 1994) ("[P]aychecks are to be considered continuing violations of the law when they evidence discriminatory wages."); *Calloway* v. *Partners Nat'l Health Plans*, 986 F.2d 446, 448-49 (CA11 1993) ("Contrary to Partners' assertions, Calloway's wage claim is not a single violation with a continuing effect. * * * When the claim is one for discriminatory wages, the violation exists every single day the employee works."); *Beavers* v. *American Cast Iron Pipe Co.*, 975 F.2d 792, 796-800 (CA11 1992) ("[T]he Supreme Court clearly recognizes the distinction this court has drawn between the present effects of a one-time violation—as in *Ricks*—and the continuation of the violation into the present—as in *Bazemore*."); *EEOC* v. *Penton Indus. Publ'g Co.*, 851 F.2d 835, 838 (CA6 1988) ("The Supreme Court has recognized the existence of a 'continuing violation'" in *Bazemore*, where "there was a *current* and *continuing* differential between the wages earned by black workers and those earned by white workers.") (emphasis in original); see also

in the circuits even before this Court's decision in that case.[17] In statutory interpretation, stability is a virtue and novelty a vice, especially "in an area that has seen careful, intense, and sustained congressional attention." *Square D. Co.* v.

Zuurbier v. *Medstar Health, Inc.*, 895 A.2d 905, 913 n.13 (D.C. 2006) ("[A]n employee may recover for discriminatorily low pay received within the limitations period because each paycheck constitutes a discrete discriminatory act.")

[17] See, *e.g.*, *Gibbs* v. *Pierce County Law Enforcement Support Agency*, 785 F.2d 1396, 1399 (CA9 1986) ("The policy of paying lower wages * * * on each payday constitutes a 'continuing violation.'"); *Berry* v. *Bd. of Supv. of LSU*, 715 F.2d 971, 980 (CA5 1983) ("We also observe that there are a number of decisions in which salary discrimination has been found to constitute a continuing violation of Title VII, usually on the rationale that each discriminatory paycheck violates the Act."); *Bartelt* v. *Berlitz Sch. of Languages of Am.*, 698 F.2d 1003, 1004-05 & n.1 (CA9 1983) (rejecting argument that disparate pay claim accrued upon making of pay decision); *Lamphere* v. *Brown Univ.*, 685 F.2d 743, 747 (CA1 1982) ("[A] decision to hire an individual at a discriminatorily low salary can, upon payment of each subsequent pay check, continue to violate the employee's rights."); *Hall* v. *Ledex, Inc.*, 669 F.2d 397, 398 (CA6 1982) ("[T]he discrimination was continuing in nature. Hall suffered a denial of equal pay with each check she received."); *Jenkins* v. *Home Ins. Co.*, 635 F.2d 310, 312 (CA4 1980) ("Unlike *Evans*, the Company's alleged discriminatory violation occurred in a series of separate but related acts throughout the course of Jenkins' employment. Every two weeks, Jenkins was paid for the prior working period; an amount less than was paid her male counterparts for the same work covering the same period."); *Satz* v. *ITT Financial Corp.*, 619 F.2d 738, 743 (CA8 1980) ("The practice of paying discriminatorily unequal pay occurs not only when an employer sets pay levels, but as long as the discriminatory differential continues."); *Hodgson* v. *Behrens Drug Co.*, 475 F.2d 1041, 1051 (CA5 1973) ("Sex-based, discriminatory wage payments constitute a continuing violation of the Equal Pay Act.").

Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 424 (1986). See Part IV, *infra*.

B. The EEOC Has Consistently Interpreted Title VII To Permit Challenges To Disparate Pay Received During The Limitations Period.

Like the courts of appeals, the EEOC has consistently interpreted Title VII to permit an employee to file a disparate pay charge within 180 or 300 days of the receipt of a discriminatory paycheck. The EEOC's Compliance Manual provides that "[a] discrete act, such as failure to hire or promote, termination, or denial of transfer, is independently actionable if it is the subject of a timely charge." EEOC COMPLIANCE MANUAL § 2-IV.C. Citing *Bazemore*, the Manual goes on to explain that "[r]epeated occurrences of the same discriminatory employment action, *such as discriminatory paychecks*, can be challenged as long as one discriminatory act occurred within the charge filing period." *Ibid.* (emphasis added, footnote omitted). See also *id.* § 10-IV n.39 (same for Equal Pay Act); EEOC COMPLIANCE MANUAL § 2-IV.C (July 27, 2000) (prior version of Manual, stating that each discriminatory paycheck constitutes "a wrong actionable under Title VII"). The agency also repeated this position as *amicus* in this case, supporting the petition for rehearing. See EEOC *Amicus* Br. 9.

The Commission has given effect to that interpretation in a series of administrative decisions under the provisions of the Act extending Title VII's protections to federal employees. See 42 U.S.C. 2000e-16(a); 29 C.F.R. pt. 1614. In one case, for example, an ALJ dismissed a federal employee's disparate pay claim as untimely because the disparity arose, and the employee became aware of the disparity, outside the limitations period. The Commission disagreed, explaining that

> [e]ach paycheck that complainant receives which is less than that of similarly situated employees outside of her protected classes could support a claim under

> Title VII if discrimination is found to be the reason for the pay discrepancy. See *Bazemore* v. *Friday*, 478 U.S. 385, 396 (1986) (Each week's paycheck that delivers less to a black than a similarly situated white is a wrong actionable under Title VII). The Commission in essence determines that complainant's claim of unequal wages is a recurring violation, meaning that complainant was aggrieved each time she received a paycheck that purportedly provided her with wages unequal to those received by male employees doing substantially the same work. See, e.g., *Englund v. EEOC*, Appeal No. 01A10826 (July 13, 2001).

Albritton v. *Postmaster General*, No. 01A44063, 2004 WL 2983682, at *2 (EEOC Office of Fed. Op., Dec. 17, 2004).[18]

Any ambiguity in the statute should be resolved through deference to the Commission's reasonable administrative interpretation of the Act. See *United States* v. *Mead Corp.*, 533 U.S. 218, 229-30 & n.12 (2001); *EEOC* v. *Commercial Office Prods.*, 486 U.S. 107, 115 (1988).

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[18] See also, *e.g.*, *Bynum-Doles* v. *Winter*, No. 01A53973, 2006 WL 2096290, at *5 (EEOC Office of Fed. Op., July 18, 2006); *Amft* v. *Mineta*, No. 07A40116, 2006 WL 985183, at *5 (EEOC Office of Fed. Op., Apr. 6, 2006); *Ward* v. *Potter*, No. 01A60047, 2006 WL 721992, at *1 (EEOC Office of Fed. Op., Mar. 10, 2006); *McCrae* v. *Gutierrez*, No. 01A53762, 2005 WL 2254365, at *1 (EEOC Office of Fed. Op., Sept. 9, 2005); *Sherlock* v. *England*, No. 01A13830, 2002 WL 31232256, at *3 (EEOC Office of Fed. Op., Sept. 25, 2002).

C. Treating Each Paycheck As A Discrete Event Under Title VII Is Consistent With The Law's Treatment Of Claims Related To Periodic Payments In Analogous Contexts.

The principles applied by the courts of appeals and the EEOC have also been applied in analogous contexts for decades.

Equal Pay Act. *Bazemore* was presaged by this Court's Equal Pay Act decision in *Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974). In the 1940s, Corning Glass Works employed men as night-shift plant inspectors and women for the day shift, paying its male employees both a shift-differential to account for the less desirable shift and a higher base salary because of their sex. In 1966, Corning began to allow women to apply to work on the night shift, and in 1969 a new collective bargaining agreement required that the difference in base pay between day and night inspectors be eliminated for all new hires. However, the disparity in base pay continued for those previously hired, and most female inspectors continued to have lower base salaries than men performing the equivalent job. *Id.* at 192-94.

When the Secretary of Labor eventually brought suit – decades after the relevant discriminatory pay decision had been made – this Court had no difficulty in concluding that the continued enforcement of the policy resulted in a present violation of the Act. "That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work." *Id.* at 205. The only question was whether subsequent revisions to the policy had cured the violation. *Id.* at 205-06. In answering that question, the Court explained that it was not enough that new hires were given equal wages because the employer "continued to provide unequal base wages for employees hired before that date, a discrimination

likely to continue for some time into the future * * * ." *Id.* at 208.

Consistent with this holding, the lower courts routinely hear Equal Pay Act claims challenging pay disparities that first arose outside the limitations period. See, *e.g.*, *Pollis* v. *New Sch. for Soc. Research*, 132 F.3d 115, 119 (CA2 1997); *Ashley*, 66 F.3d at 168; *Brinkley-Obu*, 36 F.3d at 347; *Gandy* v. *Sullivan County, Tenn.*, 24 F.3d 861, 864 (CA6 1994); *Miller* v. *Beneficial Mgmt. Corp.*, 977 F.2d 834, 843-44 (CA3 1992); *Nealon* v. *Stone*, 958 F.2d 584, 591 (CA4 1992).

Fair Labor Standards Act. It is equally well established that the statute of limitations for violations of the minimum wage and overtime provisions of the Fair Labor Standards Act runs anew with each paycheck. See, *e.g.*, *Knight* v. *Columbus, Ga.* 19 F.3d 579, 581 (CA11 1994) ("Each failure to pay overtime constitutes a *new* violation of the FLSA.") (emphasis in original); *Hodgson* v. *Behrens Drug Co.*, 475 F.2d 1041, 1050 (CA5 1973) ("It is well settled that [a] separate cause of action for overtime compensation accrues at each regular payday immediately following the work period during which the services were rendered and for which the overtime compensation is claimed.") (internal quotation marks omitted); *Halferty* v. *Pulse Drug Co.*, 821 F.2d 261, 271 (CA5 1987) ("A cause of action accrues at each regular payday immediately following the work period during which the services were rendered for which the wage or overtime compensation is claimed."); *Beebe* v. *United States*, 640 F.2d 1283, 1293 (Ct. Cl. 1981) (holding that "a separate cause of action accrued each payday when the [defendant] excluded the overtime compensation [the plaintiffs] claim in this suit").

Wage Disputes Generally. Indeed, wage disputes generally have long been treated as giving rise to recurring claims with independent limitations periods. See, *e.g.*, 31 WILLISTON ON CONTRACTS § 79:17 (4th ed. 1990) ("Where compensation for services rendered is payable in installments, the statute of limitations begins to run on each installment

when it becomes due and payable."); H.G. Wood, A TREATISE ON THE LIMITATION OF ACTIONS AT LAW AND IN EQUITY 663 (1916) (same). See also *Burich* v. *United States*, 366 F.2d 984, 986 (Ct. Cl. 1966) (in case under Federal Employee Pay Act of 1945, 5 U.S.C. 911, observing that "[t]his court has long adhered to the view that a suit for compensation due and payable periodically is, by its very nature, a 'continuing claim' which involves multiple causes of action, each arising at the time the Government fails to make the payment alleged to be due") (collecting cases).

Other Installment Obligations. The rule applied in *Bazemore* is also applied to periodic payment obligations of other types. This Court applied the rule, for example, in *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. of California*, 522 U.S. 192 (1997), where pension fund trustees sued an employer to recover payments due under the Multiemployer Pension Plan Amendments, 29 U.S.C. 1381(a). Applying the "standard rule for installment obligations," this Court held that "a new cause of action, carrying its own limitations period, arises from the date each payment is missed." *Id.* at 208 (citation and internal quotation marks omitted). See also *id.* at 208-09 & n.6 (collecting cases applying same rule to "installment judgments," such as court-ordered child support and alimony). This Court acknowledged that, as a result of this rule, a plaintiff could wait nearly twenty years – the length of the installment plan – before bringing suit. *Id.* at 210. But it nonetheless concluded that a "pension fund's action to collect unpaid withdrawal liability is timely as to any payments that came due during the" limitations period. *Ibid.*

National Labor Relations Act. The same basic rule has been applied under the National Labor Relations Act (NLRA), 29 U.S.C. 160, which served a model for many of Title VII's enforcement provisions. See, *e.g.*, *Lorance* v. *AT&T Tech., Inc.*, 490 U.S. 900, 909 (1989).

In *Farmingdale Iron Works*, 249 NLRB 98, 99 (1980), for example, the National Labor Relations Board held that "each failure to make the contractually required monthly benefit fund payments constituted a separate and distinct violation of Respondents' bargaining obligation and, therefore, that any benefit fund payment due [within the limitations period] is subject to the Board's remedial powers." Similarly, in *GMAC* v. *NLRB*, 476 F.2d 850, 852 (CA1 1973), an employer decided to stop giving merit raises after its employees began to unionize. The court rejected the employer's assertion that "the Board was barred by [the NLRB limitations provision] from finding that [its] conduct was unlawful because the original decision to stop paying these raises was made more than six months before the complaint in this action was filed." *Id.* at 853.

Similarly, in *Melville Confections, Inc.* v. *NLRB*, 327 F.2d 689 (CA7 1964), an employer excluded unionized employees from participation in the company profit-sharing plan. Although the decision to discriminate against the union was made more than four years before a charge was filed with the NLRB, the court held that the charge was timely because the discrimination was continuously implemented during the limitations period. *Id.* at 692. See also, *e.g.*, *NLRB* v. *F.H. McGraw & Co.*, 206 F.2d 635, 639 (CA6 1953) (refusal to hire non-union employees constituted present violation of the Act even though action simply implemented a contract executed outside the limitations period).

Antitrust. Finally, if Goodyear had charged an illegal price for its tires, rather than paid an illegal wage for its labor, there would be no question that its customers would be able to sue for each sale that occurred during the limitations period, even if the illegal price-setting decision took place outside the limitations period. "Antitrust law provides that, in the case of a 'continuing violation,' say, a price-fixing conspiracy that brings about a series of unlawfully priced sales over a period of years, 'each overt act that is part of the violation and that injures the plaintiff,' *e.g.*, each sale to the

plaintiff, 'starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.'" *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 189 (1997) (quoting 2 P. Areeda & H. Hovenkamp, ANTITRUST LAW ¶ 338b, at 145 (rev. ed. 1995) (footnote omitted)).

IV. Congress Enacted And Amended Title VII Against The Backdrop Of The Legal Principles Applied In *Bazemore*.

Accordingly, Congress enacted, and later amended, Title VII against a legal backdrop in which claims relating to periodic payment such as wages were considered to arise with each challenged payment. By the time Congress amended Title VII in 1972 and again in 1991, that understanding had been applied by the lower courts and then this Court to disparate pay claims. "This background law not only persuades by its regularity over time but points to tacit congressional approval" of the general rule, "Congress being presumed to have known of this settled judicial treatment * * * when it enacted and later amended Title VII." *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 116-17 (2002). In all cases, "considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Burlington Industries*, 524 U.S. at 764 (citation omitted). But that rule applies with special force when, as here, "Congress has not altered" one of this Court's cases, "even though it has made significant amendments to Title VII in the interim." *Id.* at 764-65.

Indeed, in 1991 Congress plainly ratified *Bazemore* and its progeny in the lower courts when it amended Title VII's time limits to overrule *Lorance* v. *AT&T Tech., Inc.*, 490 U.S. 900 (1989),[19] but left *Bazemore* intact. The Senate Report for

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[19] Pointing to the "'special treatment' accorded to seniority systems under Section 703(h)," *Lorance* held that certain challenges to seniority systems – *i.e.*, those alleging that a system

the initial version of the bill explicitly explained that the revision

> does not alter existing law regarding when an employer's discrete action is, and is not, a continuing violation of the law * * *. In *Bazemore* v. *Friday*, 478 U.S. 385 (1986), for example, the salaries of minority workers had, for racial reasons, been set at a lower level than those of comparable white workers; the Supreme Court properly held that each application of that racially motivated salary structure, *i.e.*, each new pay check, constituted a distinct violation of Title VII. Section 7(a)(2) generalizes the result correctly reached in *Bazemore*.

Civil Rights Act of 1990 – Report from the Senate Labor and Human Resources Committee, S. Rep. No. 101-315, at 54 (1990). Although the bill underwent further changes, Congress's intent to retain existing limitations jurisprudence, while overturning *Lorance*, remained the same. Thus, the interpretive memorandum of the sponsors of the final legislation explained that the revision to overrule *Lorance* was necessary, in part, because "[u]nfortunately, some lower courts have begun to apply the '*Lorance* rationale' outside the context of seniority systems." 137 Cong. Rec. S15483, S15485 (daily ed. Oct. 30, 1991). The sponsors then explained that the "legislation should be interpreted as disapproving the extension of this decision rule to contexts outside of seniority systems," but that it "should not be interpreted to affect the sound ruling of the Supreme Court regarding 'continuing violations.'" *Ibid.*[20]

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neutral on its face and in application was enacted for a discriminatory purposes – accrue at the time of the adoption on the system, not its application. 490 U.S. at 911-12.

[20] See also, *e.g.*, H.R. Rep. No. 102-40, at 23-24 & n.39 (1991) (House version of what would become Civil Rights Act of 1991) ("What Subsection 7(a)(2) does not do is affect existing law

The inference of congressional approval of *Bazemore* is all the more powerful in light of the fact that the 1991 amendments were explicitly enacted in order to revise not only *Lorance* but *seven* other of this Court's decisions with which Congress disagreed, including *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), decided the same day as *Bazemore*. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 250-51 (1994).

V. There Is No Basis For An Extra-Textual Limitation On "How Far Back" A Plaintiff May Reach For Evidence To Prove Liability On An Otherwise Timely Claim.

In the face of *Bazemore* and the overwhelming precedent applying it to disparate pay cases, the Eleventh Circuit seemed to recognize that challenges to paychecks received during the limitations period might be timely under Section 706(e)(1). Pet. App. 22a. But the court asserted there is a separate question "how far back in time the plaintiff may reach in looking for the intentionally discriminatory act that is the central, requisite element of every successful disparate treatment claim." Pet. App. 22a-23a. The court seemingly acknowledged that this limitation would not derive from Title VII's limitations provision, or any other portion of the text of the statute. But the court nonetheless insisted that "[t]here must, however, be some limit on how far back the plaintiff can reach." Pet. App. 23a. Implementing that intuition, the court created an extra-textual limitation of its own, supplementing the express limitations provision of Title VII with the requirement that "at least in cases in which the employer has a system for periodically reviewing and re-establishing employee pay, an employee seeking to establish that his or her pay level was unlawfully depressed may look no further into the past than the last affirmative decision

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with respect to the 'continuing violation' theory.") (citing *Bazemore* as example in footnote).

directly affecting the employee's pay immediately preceding the start of the limitations period." Pet. App. 24a. This rule – never before applied by any court during the forty years of Title VII's existence – is plainly inconsistent with the decisions of this Court, the legal background against which the statute was enacted and amended, and the general purposes of the Act.

A. The Eleventh Circuit's Rule Would Have Required The Opposite Result In *Bazemore* Itself.

To start, the Eleventh Circuit's rule is flatly inconsistent with the holding, rationale, and result of *Bazemore* itself. The Extension Service, like Goodyear, had in place a system of periodic salary review under which employees were ranked in order of performance and given merit raises above their existing base salaries. See *Bazemore*, 478 U.S. at 394-96 & n.7; *Bazemore*, 751 F.2d at 666-67 (describing Extension Service's system of annual performance evaluations and merit pay raise decisions). That assertedly non-discriminatory ranking system had been in place for a number of years and, in fact, had reduced somewhat the disparity that had carried over from the years before the effective date of Title VII. 478 U.S. at 394-95. Under the Eleventh Circuit's rule, the *Bazemore* plaintiffs would have been required to show that the present disparity in their pay was the result of the most recent raise decisions and would have been precluded from relying on the prior, pre-Act discrimination. And that, in fact, is what the court of appeals in *Bazemore* held and why it "considered solely whether the Extension Service discriminated with respect to the application of quartile rankings" that governed recent pay decisions. *Id.* at 397. This Court, however, held precisely the opposite: "Because, as we have explained, the Extension Service was under an obligation to eradicate salary disparities based on race that began prior to the effective date of Title VII, the Court of Appeals erred in concentrating its analysis solely on the issue whether there was racial discrimination in the ranking

system." *Ibid.* Thus, this Court specifically held that the plaintiffs could recover for the portion of the current disparity attributable to pay decisions made as long as *six years* before the Act was even applicable to the defendant. See *id.* at 395 (disparity arose prior to integration of branches in 1965).

The court of appeals' newly minted rule also conflicts with the basic rationale of *Bazemore*. This Court plainly understood that Title VII imposes no arbitrary limit on "how far back in time," Pet. App. 22a, relevant evidence of intentional discrimination may extend. Instead, Title VII imposes on an employer the "obligation to eradicate salary disparities based on race" or sex even if the disparity arose outside the limitations period (or even before the effective date of the statute). 478 U.S. at 397. The Court's holding thus can be characterized in two ways, both of which are inconsistent with the decision below. On the one hand, *Bazemore* can be read to establish that a plaintiff may prove a violation of Title VII by showing that disparate pay received during the limitations period is the result of intentional discrimination, even if the discriminatory decisions were made outside the limitations period (or effective date of the Act). Alternately, *Bazemore* can be read as recognizing that an employer has a continuing obligation to avoid perpetuation of prior discriminatory pay decisions into the present, a duty that is violated anew with each unremedied disparate paycheck. However construed, the case precludes the court of appeals' holding that petitioner was required to prove an intentionally discriminatory pay raise decision in, or immediately before, the limitations period.

B. The Eleventh Circuit's Rule Is Inconsistent With Established Rules Governing Limitations On Actions And Evidence.

The rule invented by the court of appeals furthermore is inconsistent with the law's settled treatment of limitations on actions and the evidence to prove them.

1. Limitations on "how far back a plaintiff may reach" to prove a violation of her rights are imposed by statutes of limitations and the doctrine of laches, not ad hoc judge-made rules. Indeed, the court of appeals was unable to cite any authority for its conclusion that there must be an additional timeliness restriction beyond a statutory limitations period and laches, although the issue necessarily arises under innumerable statutory regimes. It is not unusual for the elements of a claim to arise at different times. See Corman, LIMITATION OF ACTIONS § 6.1 (1991). For example, in the case of a price-fixing conspiracy, the conspiratorial agreement may be formed years before the defendant charges a particular plaintiff the illegal price. Cf., *e.g.*, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 333 (1971). But the cause of action accrues with the illegal charge, which starts the running of the statute of limitations, [21] and nothing in the law limits "how far back" the plaintiff may reach to establish the conspiratorial agreement that is the "central, requisite element of every successful" antitrust conspiracy claim. Pet. App. 23a-24a. See *Klehr*, 521 U.S. at 189.

"A statute of limitations does not operate to bar the introduction of evidence that predates the commencement of the limitations period but that is relevant to events during the period." *Fitzgerald* v. *Henderson*, 251 F.3d 345, 365 (CA2

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[21] This Court has "repeatedly recognized that Congress legislates against the 'standard rule that the limitations period commences when the plaintiff has a complete and present cause of action.'" *Graham County Soil & Water Conserv. Dist.* v. *United States*, 125 S. Ct. 2444, 2450 (2005). "Unless Congress has told us otherwise * * *, a cause of action does not become 'complete and present' for limitations purposes until the plaintiff and file suit and obtain relief." *Bay Area Laundry*, 522 U.S. at 201. Thus, a claim accrues with the establishment of the *last* (not the *first*) element of a plaintiff's cause of action. In a disparate pay case, like many other claims, the last element is the injury to the plaintiff (*i.e.*, the payment of a disparate wage).

2001) (collecting cases); 51 Am. Jur. 2d LIMITATION OF ACTIONS § 24 (2006). Rather, any "suggestion that an item of evidence relates to a period that is too remote goes to both the item's relevance and its weight," *Fitzgerald*, 251 F.3d at 365, not to whether the plaintiff is absolutely precluded from establishing her claim. Thus, in *Morgan*, this Court held that Title VII's limitation provision does not "bar an employee from using the prior acts as background evidence in support of a timely claim." 536 U.S. at 113. Indeed, it is commonplace for a plaintiff to rely on evidence outside the limitations period to establish that an act occurring within the limitations period was unlawful. For example, in *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), this Court considered a discriminatory termination case under Title VII. In response to the plaintiff's *prima facie* case, the employer asserted that the plaintiff had been terminated because of poor performance. The plaintiff countered with further direct evidence of discriminatory animus and other proof of pretext based on events taking place years before the challenged termination. See *id.* at 151-53.

It makes no difference that the events outside the limitations period are used to establish a critical element of the violation. In *United States* v. *Carlson*, 235 F.3d 466 (CA9 2000), a defendant argued that the government was precluded from relying on acts outside the limitations period to establish the "evasion" element of a tax evasion claim. The court disagreed, explaining that "the statute of limitations for evasion of assessment begins to run from the occurrence of the last act necessary to complete the offense, normally a tax deficiency." *Id.* at 470. That the evasion element was established earlier, and outside the limitations period, did not preclude the government from proving that element of the offense. *Ibid.* "It would be a bizarre result indeed if a crime properly prosecuted within the limitations period could not be proven because an essential element, such as intent, could only be established by proof of incidents occurring outside

the period." *United States* v. *Ashdown*, 509 F.2d 793, 798 (CA5 1975).

The rule is no different in a civil case or when the element is discriminatory animus. In *Hunter* v. *Underwood*, 471 U.S. 222, 233 (1985), for example, this Court struck down a provision of the Alabama Constitution of 1901 because it was "motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect." The fact that the discriminatory intent element was established more than eighty years before the plaintiff suffered the injury that completed the cause of action was of no import. The implementation of a prior discriminatory decision within the limitations period was sufficient.

Indeed, as Judge Easterbrook noted in *Palmer* v. *Board of Education*, 46 F.3d 682 (CA7 1995), a contrary rule would have rendered untimely the suits that produced *Brown* v. *Board of Education*, 347 U.S. 483 (1954), as the discriminatory treatment in those cases was plainly based on policies established well outside the limitations period. Accordingly, in *Palmer*, the court rejected the claim that students' objections to race-based school assignments were untimely because they were not raised within two years (the applicable limitations period) of the creation of the assignment system. "We believe – as the Court assumed in *Brown* – that a claim of racial discrimination arises each day a child is assigned to school under a racially discriminatory policy." 46 F.3d at 683. As the court in *Palmer* recognized, this same principle applies to discrimination in pay: "A public employer that applies different salary schedules to black and white employees commits a new wrong every pay period, and the fact that the employer has been violating the Constitution for a generation does not permit it to commit fresh violations." *Id.* at 686 (citing *Bazemore*).

This Court has based any number of decisions on the same assumption it entertained in *Brown*, permitting civil

rights plaintiffs to challenge present disparate treatment arising from discriminatory decisions made outside the limitations period. For example, in *City of Los Angeles* v. *Manhart*, 435 U.S. 702 (1978), this Court considered whether an employer was violating Title VII through a long-standing practice of requiring female workers to make larger pension contribution than male workers. As a result of this policy, "a female employee took home less pay than a male employee earning the same salary." *Id.* at 705. This Court did not find the claim untimely but instead held that the practice violated Title VII and went on to consider the appropriate remedy. *Id.* at 717-18. See also *Arizona Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans* v. *Norris*, 463 U.S. 1073 (1983).

2. The court of appeals' limitation of its new rule to cases involving "a system for periodically reviewing and re-establishing employee pay," Pet. App. 24a, does not make the rule any more defensible.

As an initial matter, it is important to be clear about what the Eleventh Circuit held. The court could not have intended its reference to "re-establishing employee pay" to mean a system in which the worker's salary is subject to *de novo* review, as distinguished from a system in which the employee is evaluated for a possible marginal increase to her present salary. First, there is no need for a special rule for employers who conduct *de novo* reviews. When an employer conducts a truly *de novo* re-establishment of a worker's pay, that review constitutes the only cause of the present disparity and, accordingly, the employee must establish that the *de novo* decision was discriminatory. This requirement arises not from Section 706(e)(1)'s time limitation, but rather from the substantive elements of a Title VII violation. Second, the Eleventh Circuit could not have intended to create a rule restricted to cases involving truly *de novo* re-establishment of pay because that rule would have no application to this case. The court's opinion and the record below are clear that Goodyear's annual review process was limited to determining

whether the employee should be given a marginal raise based on the prior year's performance.[22]

As noted above, even subject to this limitation, the rule adopted by the Eleventh Circuit would have required the opposite result in *Bazemore* itself, for the employer in that case also had in place a system of periodic pay reviews. See Section V(A), *supra*. That this system provided an "opportunity for an employee to make any pay-related complaints" at "the point at which the employee's salary is reviewed," Pet. App. 24a, was immaterial to this Court's decision in *Bazemore* and remains irrelevant here.

There is no basis for the court of appeals' distinction in the text of Title VII itself. Section 706(e) requires a charge within 180 days of the "unlawful employment practice" in every case, whether the employer conducts periodic pay reviews or not. 42 U.S.C. 2000e-5(e)(1). And there is no reason to conclude that the definition of an "unlawful employment practice" changes depending on how an employer organizes its pay decisionmaking process.

Nor is there any sound policy basis for the distinction the Eleventh Circuit drew. As the court acknowledged in attempting to distinguish prior circuit precedent, its rule is not well suited to ferreting out claims that are likely to be stale. Where, as in *Calloway*, an employer has no system for periodic review, the Eleventh Circuit would permit claims based on the setting of a worker's initial wage years outside the limitations period. Pet. App. 26a-27a.

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[22] See, *e.g.*, Pet. App. 4a (describing how, "in the early months of each year, each [manager] was charged with recommending salary increases for the salaried employees under his or her supervision"); *id.* 4a-5a (annual evaluation included employee's "performance ranking, present salary, and salary range; the date of his or her last increase; the *recommended increase for the coming year (in dollars and as a percentage increase over present salary)*; and the date that the increase would become effective") (emphasis added). See also, *e.g.*, J.A. 69-70.

Nor is the distinction justified on the ground that employers like Goodyear give "the plaintiff regular opportunities to complain of improperly deflated pay and to seek a raise," Pet. App. 26a. Even in the absence of annual pay reviews, employees have ample "opportunity * * * to make any pay-related complaints." *Id.* 24a. Indeed, this Court has encouraged employers to develop grievance systems specifically to ensure that workers will continually have access to a means of raising such complaints. See, *e.g.*, *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 805-08 (1998). The Court has not, however, altered the charge filing deadlines when such systems are available or put to use. See *Int'l Union of Elec., Radio & Mach. Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 236-41 (1976) (limitations period not tolled during pendency of grievance or arbitration proceedings).

In any case, the court of appeals' suggestion that a periodic pay review system creates a special opportunity for correcting past discrimination is misleading. In this case, for example, Goodyear's managers testified that they were precluded from considering whether the current salary level was inappropriate and were limited to asking only whether the prior year's performance warranted a raise. See, *e.g.*, J.A. 69-70, 86-87, 94-95. Moreover, even if they had taken prior discrimination into account, the caps Goodyear imposed on raises precluded managers from providing petitioner with an adequate remedy.[23]

The Eleventh Circuit's rule would also be difficult to implement in practice, requiring workers, the EEOC and the courts to answer a variety of difficult questions – *e.g.*, whether the company reviews pay with sufficient frequency to invoke the rule; whether the employee is truly able to

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[23] See J.A. 131, 133 (maximum raise allowed was five percent Individual Performance Award, plus five percent Top Performance Award); J.A. 87-88 (supervisor given $906 for raises to spread among six Area Managers).

complain about prior pay discrimination as grounds for seeking a raise; whether limitations on the frequency or amount of possible raises disqualifies the system, etc. – in order to decide the threshold question of timeliness. Such uncertainty is anathema to any limitations rule and is particularly inappropriate under Title VII, which was intended to create "a remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process." *Commercial Office Prods.*, 486 U.S. at 124.

* * * * *

To the extent there is a limit on "how far back a plaintiff may reach" to prove the discriminatory intent responsible for a current disparity in wages, that limit derives from the established doctrine of laches, not the unprecedented rule created by the Eleventh Circuit in this case. Laches directly addresses the concerns animating the lower court's decision – the need "to encourage prompt resolution of employment disputes" and to avoid stale claims, Pet. App. 23a – but with the balanced and flexible approach inherent in equity and importantly absent from the rule applied below. Having failed to invoke that traditional defense at trial, Goodyear was not entitled to escape liability by convincing the court of appeals that its most recent decisions simply perpetuated, rather than exacerbated, its prior discriminatory pay raise decisions. And because there was ample evidence supporting the jury's finding that that petitioner was paid less than her male colleagues for equal work because of her sex during the limitations period, the liability verdict should be reinstated.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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IN THE

Supreme Court of the United States

LILLY M. LEDBETTER,

Petitioner,

v.

THE GOODYEAR TIRE & RUBBER COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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CORPORATE DISCLOSURE STATEMENT

Respondent makes the following corporate disclosure statement pursuant to Supreme Court Rule 29.6:

The Goodyear Tire & Rubber Company has no parent company. No publicly held company owns 10% or more of The Goodyear Tire & Rubber Company's stock.

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COUNTERSTATEMENT OF THE CASE

Lilly Ledbetter worked for The Goodyear Tire & Rubber Company for 19 years, first as a Supervisor and subsequently as an Area Manager. Ledbetter began her employment at the same salary as male Supervisors. During the ensuing 19 years, several different managers made discrete annual decisions regarding what merit increase Ledbetter should receive in her salary. In some years, the increases that Ledbetter received were greater than those awarded to male co-workers. In other years, they were less. In still other years, Ledbetter was on layoff, or was about to be laid off, and thus was not eligible for an increase. In this lawsuit, Ledbetter seeks to challenge the collective effect of those 19 years of salary determinations, particularly focusing on alleged discrimination occurring in the 1980's and early 1990's. Each of the alleged acts occurred well before Ledbetter filed a charge with the EEOC in 1998 alleging intentional pay discrimination. Applying Title VII's text and this Court's cases construing that text, the court below correctly held that Ledbetter could not pursue such a stale claim.

1. Ledbetter was hired on February 5, 1979 as a Supervisor Trainee at Goodyear's tire assembly plant in Gadsden, Alabama. Pet. App. 5a. Shortly thereafter, she became a Supervisor. Ledbetter was paid the same salary, $16,760.52, as the other Supervisors at the Gadsden plant. J.A. 39, 151-52. Moreover, in 1980 and 1981, Ledbetter received the same lockstep pay increases, based on cost-of-living adjustments, as the other Supervisors (15.59% in 1980 and 9.25% in 1981). J.A. 224; Tr. 125-28.

a. In 1982, Goodyear implemented a merit-based compensation program. Pet. App. 4a; J.A. 114-42. Under the "Pay for Performance" program, each "Business Center Manager" within a plant became responsible for determining annual merit increases for the salaried employees under his or her supervision. Pet. App. 4a-5a; J.A. 120-21. In doing

so, the Business Center Manager was required to take each employee's existing salary at the time as a given starting point; the manager was to focus only on appropriate salary increases. J.A. 69-70, 87-88, 120-21; Tr. 256-57. In that regard, the manager was also to take into account each employee's performance ranking for the year; where the employee's existing salary stood within the salary range for his or her position; and the amount and timing of the employee's most recent increase. Pet. App. 4a-5a; J.A. 120-21, 174-77. Each employee's annual increase could not exceed a specified maximum percentage, and the total amount of increases awarded in each Business Center could not exceed a set budget. Pet. App. 4a-5a, 48a; J.A. 87-88, 120-21.

b. Between 1982 and 1985 (when her title changed to Area Manager), Ledbetter received annual salary increases of 7.65%, 6.39%, 5.34%, and 7.19%. J.A. 224. For fifteen months beginning in 1986 and extending into 1987, Ledbetter was on layoff, and, as a result, she was not eligible for pay increases in 1986, 1987, or 1988. Pet. App. 5a; J.A. 167; Tr. 39, 128-31. Upon being recalled, Ledbetter's salary was less than the salaries of Area Managers who had not been laid off and had been eligible for increases during those years. J.A. 167, 195. In 1989, Ledbetter received a 5.99% increase. J.A. 224. But she was included in another layoff later in 1989; as a result, she was ineligible for a pay increase in 1990. Pet. App. 5a; J.A. 224. In 1991 and 1992, she received pay increases of 8.86% and 6.65%, respectively. J.A. 224. Ledbetter conceded at trial that Mike Nunn, her supervisor between 1990 and 1992, did not discriminate against her in determining her pay increases in those years. Tr. 132-33.

c. Between 1993 and 1996, Mike Tucker evaluated Ledbetter. In 1993, Tucker ranked Ledbetter third out of the four Area Managers and fifth out of the six salaried employees whom he supervised. Pet. App. 5a-6a; J.A. 174. Jimmy Todd, who was ranked last, received no pay increase

for the year, while Ledbetter received a 5.28% increase, the largest percentage increase awarded to any Area Manager under Tucker's supervision. Pet. App. 5a-6a; J.A. 174.

In 1994, Tucker ranked Ledbetter last among the four Area Managers and last among the six salaried employees whom he supervised. Pet. App. 6a; J.A. 175. She nevertheless received a 5% pay increase. Pet. App. 6a; J.A. 175.

In 1995, Tucker awarded Ledbetter the maximum "individual performance award"—4%—available under the compensation guidelines for that year. Pet. App. 6a; Tr. 348. Tucker awarded Ledbetter an additional increase of 3.85% in 1995 as a "top performance award" in order to raise her salary. Pet. App. 6a; Tr. 348, 363.

In 1996, Tucker ranked Ledbetter 23rd out of 24 salaried employees, and 15th out of 16 Area Managers. Pet. App. 7a; J.A. 176-77; Tr. 344. Tucker ranked Jimmy Todd 24th, and both he and the 22nd-ranked employee received no raises. Pet. App. 7a; J.A. 176-77. Because Ledbetter's 1995 raise became effective on December 1, 1995, she was not eligible for another increase in 1996. Pet. App. 7a; Tr. 141, 344.

The cumulative amount of pay increases that Ledbetter received between 1993 and 1996 was higher than the increases for three of the four male Area Managers working for Tucker. J.A. 193.

d. Because the Gadsden plant was experiencing declining production, Goodyear slated Ledbetter and Jimmy Todd—the two lowest-performing Area Managers in 1995—for layoff at the end of 1996. Pet. App. 7a, 49a. However, because other Area Managers went out on extended medical leaves, Ledbetter's layoff never took effect. Pet. App. 7a. But, having been slated for layoff, she did not receive a pay increase in 1997. Pet. App. 8a & n.4, 9a; Tr. 296-97, 318.

Throughout 1997, Ledbetter's new manager, Jerry Jones, expressed concerns to Ledbetter about her performance. Pet.

App. 8a. He eventually suggested that she apply for a non-supervisory Technology Engineer position. Pet. App. 8a. Ledbetter did so, but continued working as an Area Manager through the end of 1997. Pet. App. 8a.

In late 1997, Kelly Owen replaced Jones as the Business Center Manager responsible for evaluating Ledbetter. Pet. App. 8a. In his evaluation of Ledbetter's 1997 performance, Owen ranked Ledbetter 23rd out of 24 salaried employees, and 15th out of 16 Area Managers. Pet. App. 9a; J.A. 189-92. Dean Nance, a man, was ranked last; the two people ranked directly above Ledbetter were also men. Pet. App. 9a; J.A. 189-92. These four employees—the lowest-rated employees under Owen's supervision—did not receive merit increases in 1998. Pet. App. 9a; J.A. 189-92.

e. In August 1998, Goodyear offered an early retirement option. Pet. App. 9a. Ledbetter took early retirement effective November 1, 1998. Pet. App. 9a.

2. Ledbetter did not file an EEOC charge challenging the cumulative effect of these 19 years of salary determinations until July 21, 1998. Pet. App. 9a; J.A. 147-50. The record shows that she had previous experience with the EEOC charge process. The record also shows that she was aware, by no later than 1992, of a disparity between her pay and that of certain male Supervisors/Area Managers.

a. Specifically, in 1982, Ledbetter had filed a charge with the EEOC alleging that Mike Maudsley, a former department foreman who was deceased by the time of trial in this case, had sexually harassed her. J.A. 103-09. Ledbetter and Goodyear resolved these allegations without litigation. J.A. 42-43.

b. With regard to her pay, Ledbetter testified that "[d]ifferent people that [she] worked for along the way had *always* told [her] that [her] pay was extremely low." J.A. 233 (emphasis added). She recalled that her manager told her in 1992 that her pay was lower than that of other Area Managers, and that by 1994 or 1995, she had learned the

amount of the difference. J.A. 230-33. In 1995, Ledbetter told Mike Tucker that she "needed to earn an increase in pay" because she "wanted to get in line with where [her] peers were, because . . . at that time [she] knew definitely that they were all making a thousand [dollars] at least more per month . . . ." J.A. 231-32; *see also* J.A. 236-37, 239-40.

c. On March 25, 1998, Ledbetter filed a questionnaire with the EEOC alleging that she had been forced into the Technology Engineer position. J.A. 143-46. On July 21, 1998, she filed a formal charge in which she further alleged that she was being paid a discriminatorily low salary. J.A. 147-50.

3. After receiving a right-to-sue letter, Ledbetter filed suit, asserting multiple claims of intentional age discrimination, sex discrimination, and retaliation, in violation of Title VII, 42 U.S.C. §§ 2000e to 2000e-17; the Equal Pay Act, 29 U.S.C. § 206(d); and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34. J.A. 13-21.

a. A magistrate judge recommended that summary judgment be granted to Goodyear on all but one of Ledbetter's claims—a claim relating to a three-day suspension that she received in 1998 for a manufacturing error. With respect to Ledbetter's intentional pay discrimination claim under Title VII, the magistrate judge found that, because "plaintiff's performance was ranked at or near the bottom of Area Managers," Ledbetter had not "cast sufficient doubt on [Goodyear's] proffered nondiscriminatory reason[]" for paying her less than other Area Managers. Pet. App. 67a (internal citations and quotation marks omitted). With respect to Ledbetter's Equal Pay Act claim, the magistrate judge concluded that Ledbetter had not "established a prima facie case with respect to Area Managers outside the Business Center in which she worked," who were not appropriate comparators. Pet. App. 73a. As the magistrate judge explained, "[e]ach of the defendant's

Business Centers had a particular purpose, and made different products," so that "varied" and "specialized skill[s] w[ere] required . . . to supervise employees in the different business centers." Pet. App. 72a-73a. The magistrate judge further concluded that "the disparity between [Ledbetter's] pay and that of her comparators" in her *own* Business Center was "based on factors other than sex," namely, Ledbetter's "weak" performance. Pet. App. 73a, 74a.

b. Finding "credibility" disputes in the testimony of Mike Tucker concerning his recommendations about Ledbetter's salary increases between 1992 and 1995, the district court denied summary judgment on Ledbetter's intentional pay discrimination claim. D. Ct. Dkt. #33 (Mem. Op.), at 1-2; D. Ct. Dkt. #34 (order). The district court also denied summary judgment on Ledbetter's transfer, retaliation, and discipline claims. D. Ct. Dkt. #33 (Mem. Op.), at 2-3; D. Ct. Dkt. #34 (order). But the district court entered summary judgment on all remaining claims, including Ledbetter's Equal Pay Act claim. D. Ct. Dkt. #33 (Mem. Op.), at 3; D. Ct. Dkt. #34 (order).

c. At trial, at the close of the evidence, the district court granted judgment as a matter of law on Ledbetter's claims of disparate discipline and retaliatory refusal to rehire, but not on Ledbetter's disparate pay and involuntary transfer claims. Pet. App. 10a; J.A. 98; Tr. 382, 384. A jury then found for Goodyear on the transfer claim but returned a verdict for Ledbetter on the pay claim. Pet. App. 10a-11a. The jury awarded Ledbetter $223,776 in back pay, $4,662 in damages for mental anguish, and $3,285,979 in punitive damages. Pet. App. 11a.

d. In post-trial motions, Goodyear renewed its argument made at trial that Ledbetter's pay claim was time-barred as to all pay decisions made prior to September 26, 1997 (six months prior to the filing of Ledbetter's EEOC questionnaire). Goodyear also argued that no reasonable jury could have concluded that the one pay decision made

within the charge-filing period, by Kelly Owen, was intentionally discriminatory. The district court rejected both arguments, stating that:

> The jury could reasonably have found that Terry Amberson is an appropriate comparator. Apparently, both he and the Plaintiff were paid the same salary on April 1, 1979, and again on April 16, 1979. The jury could reasonably have concluded that but for the gender discrimination, their salaries would have been the same up to November 1, 1998.

Pet. App. 41a (internal citation omitted). The court did, however, remit the total award to $360,000, including $300,000 in compensatory and punitive damages and $60,000 in backpay, plus attorneys' fees and costs. Pet. App. 11a, 38a-39a. The district court held that Ledbetter was entitled to two years of backpay "[b]ecause of the continuing nature of the disparate salary payments . . . ." Pet. App. 41a.

4. The Eleventh Circuit reversed. That court concluded that a pay claim is "clear[ly] . . . governed by that part" of *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), that "address[es] claims alleging 'discrete acts of discrimination.'" Pet. App. 17a. It further concluded that Ledbetter could "state a timely cause of action for disparate pay only to the extent that the 'discrete acts of discrimination' of which she complains occurred within the limitations period . . . ." Pet App. 19a.

The Eleventh Circuit noted that "a series of pre-*Morgan* cases," applying this Court's decision in *Bazemore v. Friday*, 478 U.S. 385 (1986), had held that "an employee's pay [claim] was not time-barred so long as the plaintiff received within the limitations period at least one paycheck implementing the pay rate the employee challenged as unlawful." Pet. App. 20a. But the court found that, even "[a]ssuming that these cases survive *Morgan* . . . they do not speak to how far back in time the plaintiff may reach in looking for the intentionally discriminatory act that is the

central, requisite element of every successful disparate treatment claim." Pet. App. 22a-23a. The court noted that, "[u]nless there is a claim that the person—or, more likely today, the computer—who actually issued the paychecks in question did so with intent to discriminate, the operative act of discrimination will always be . . . the act of making the underlying decision about what the plaintiff should be paid." Pet. App. 23a. The court further found that allowing a plaintiff to "question every decision made contributing to his or her" present salary level would entirely nullify Title VII's charge-filing requirement. Pet. App. 23a. For these reasons, the court held that "an employee looking to establish that his or her pay level was unlawfully depressed may look no further into the past than the last affirmative decision directly affecting the employee's pay immediately preceding the start of the limitations period." Pet. App. 24a.

The Eleventh Circuit next held that Ledbetter had not provided legally sufficient evidence that either the "one raise decision that was made within the limitations period"—*i.e.*, Kelly Owen's decision that she not receive a raise in 1998—or the preceding decision that she not receive a raise in 1997 was motivated by Ledbetter's sex. Pet. App. 27a-31a. With regard to the former, the court noted that Ledbetter had been ranked 23rd out of 24 employees in Tire Assembly, and 15th out of 16 Area Managers, based on her performance; that the men ranked at the bottom with Ledbetter also had been denied raises; and that there was "no evidence that Owen purposefully underrated Ledbetter's performance for 1997." Pet. App. 31a. With regard to the 1997 decision, the court found that the "uncontradicted evidence . . . established that Ledbetter's impending layoff was the reason for her being denied a raise . . . ." Pet. App. 32a.

SUMMARY OF THE ARGUMENT

Ledbetter lost her Equal Pay Act claim in the district court; she did not assert a Title VII disparate impact claim; and the Eleventh Circuit found legally insufficient evidence

of intentional pay discrimination during the Title VII charge-filing period. The only question left is whether Ledbetter can nonetheless pursue a claim that her present salary is the result of allegedly intentionally discriminatory decisions occurring outside of Title VII's charge-filing period. She cannot.

1. Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e)(1), requires that "[a] charge under this section shall be filed within [180] days after the alleged unlawful employment practice occurred." This charge-filing requirement, which this Court has described as a compromise essential to the enactment of Title VII as a whole, protects courts and defendants against stale claims and promotes conciliation rather than litigation.

To honor both the text and the purposes of section 706(e), this Court has repeatedly stressed the need to identify the *precise* "unlawful employment practice" at issue and to determine when that practice "occurred." In doing so, the Court has repeatedly held that section 706(e) bars a private plaintiff from bringing an intentional discrimination claim challenging discriminatory conduct occurring outside of the charge-filing period, even if that past conduct continues to have adverse effects into the charge-filing period. *See, e.g., Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 111-13 (2002); *Lorance v. A T & T Techs., Inc.*, 490 U.S. 900, 905-08 (1989); *Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977).

Under that case law, Ledbetter's intentional pay discrimination claim is time-barred. There is no evidence that Goodyear issued paychecks during the 180-day period in a discriminatory manner or with a discriminatory intent. Moreover, the court below held that Ledbetter did not have legally sufficient evidence that the single salary decision made during the charge-filing period was discriminatory—a holding that is not before this Court. Ledbetter complains

that allegedly discriminatory decisions made by different managers extending back over 19 years have lingering effects within the charge-filing period. But that is precisely the kind of stale claim that section 706(e) and this Court's cases establish is untimely. There is no basis for applying a different charge-filing rule to discrete acts of intentional pay discrimination than to other kinds of discrete acts. Indeed, allowing Ledbetter to bring such an untimely intentional discrimination claim would completely defeat the interests in repose and conciliation that underlie section 706(e).

II. *Bazemore v. Friday*, 478 U.S. 385 (1986), is not to the contrary. *Bazemore* involved a claim by the United States that concerned allegations of *present* intentional discrimination in pay. This Court held that the employer could not defend against those allegations of present discrimination on the ground that the discrimination had begun prior to the effective date of Title VII. There was no claim, much less a holding, that a present intentional pay discrimination claim by a private plaintiff may rest wholly on allegedly discriminatory decisions made outside of section 706(e)'s charge-filing period. Indeed, section 706(e) was not even in issue in *Bazemore* because claims brought by the United States are not subject to that provision.

III. Ledbetter's remaining arguments are also in error. The policy concerns that she raises provide no legal basis to rewrite the statutory charge-filing requirement. The argument that this Court should acquiesce in the position of some courts of appeals and the EEOC is unfounded: The lower courts and the EEOC have not had a consistent position, and this Court should enforce the statute as enacted, not as misconstrued by some lower courts and the EEOC. Moreover, while Ledbetter contends that numerous analogous contexts demonstrate that her claim should be considered timely, the only relevant analogy that she identifies—cases under the National Labor Relations Act—confirms that her claim is time-barred. Finally, Ledbetter's

reliance on the legislative history of statutory provisions other than section 706(e) is meritless.

ARGUMENT

As it comes to this Court, this case turns on section 706(e)'s requirement that a plaintiff raising an intentional discrimination claim under Title VII must file a timely administrative charge. Specifically, to have a timely claim, Ledbetter had to allege and prove that, during the 180-day limitations period preceding the charge filing, Goodyear intentionally discriminated against her because of her gender in setting her salary and/or in issuing her paychecks. Ledbetter sought to satisfy this burden by showing that Goodyear's facially neutral pay actions during the limitations period gave present effect to allegedly discriminatory salary decisions made outside of the charge-filing period. The Eleventh Circuit correctly rejected this claim.

In considering the issue, it is useful to note three preliminary points: First, there is no question in this case about whether Goodyear actually intentionally discriminated on the basis of gender in setting Ledbetter's salary and/or in issuing her paychecks during the charge-filing period. The Eleventh Circuit held that there was not legally sufficient evidence to support such an intentional discrimination claim, and Ledbetter did not seek or obtain certiorari review of that holding. Second, contrary to Ledbetter's misstatement (Pet. Br. at 15), there is no question here whether Goodyear paid Ledbetter less money for equal work on the basis of her sex. The district court granted summary judgment against Ledbetter on her claim under the Equal Pay Act, and she did not appeal that ruling (much less seek and obtain certiorari with respect to it). Finally, there is no claim here that Goodyear's facially neutral "Pay for Performance" compensation program—including its provision, for both men and women, that the prior year's existing salary is taken as a given and is subject only to a maximum annual merit increase—has an unlawful disparate impact on women.

There is serious doubt whether such a disparate impact claim is cognizable under Title VII. *See, e.g., County of Wash. v. Gunther*, 452 U.S. 161, 170-71 (1981); *Nashville Gas Co. v. Satty*, 434 U.S. 136, 139-42 (1977); *Am. Fed'n of State, County, & Mun. Employees v. Wash.*, 770 F.2d 1401, 1405-06 (9th Cir. 1985). But, equally important, Ledbetter never asserted any disparate impact claim in the district court—instead asserting only intentional discrimination claims on which she could obtain a jury trial and request an award of compensatory and punitive damages.

Rather, the only question presented here is whether Ledbetter has a cognizable intentional discrimination claim for a disparity in pay during the limitations period that she claims "is the result of intentionally discriminatory pay decisions that occurred outside the limitations period"—*i.e.*, a claim of alleged discrimination that Ledbetter was aware of by no later than 1992 and that she has never claimed should be the subject of equitable tolling or estoppel. Pet. at i; Pet. App. 19a n.16. Section 706(e) and this Court's cases make it clear that no such claim is cognizable.

I. LEDBETTER DOES NOT HAVE A TIMELY INTENTIONAL PAY DISCRIMINATION CLAIM FOR ACTIONS TAKEN OUTSIDE THE CHARGE-FILING PERIOD.

As the court below recognized, Title VII requires allegedly aggrieved employees like Ledbetter to assert their intentional discrimination claims within the 180-day charge-filing period or lose them. Moreover, as the court below also recognized, Title VII's charge-filing requirement does not allow an aggrieved employee to revive an intentional discrimination claim for which no timely charge was filed merely by arguing that an unlawful action outside the charge-filing period continues to have adverse effects in later time periods. But that is all that Ledbetter is arguing in this Court. Accordingly, her arguments should be rejected, and the judgment below should be affirmed.

A. Section 706(e) Bars A Private Plaintiff From Bringing An Intentional Discrimination Claim Concerning The Lingering Effects Of Decisions Occurring Outside Of The Charge-Filing Period.

Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e)(1), provides that "[a] charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred" (or within 300 days in a state that has an agency with the authority to grant or seek relief with respect to the unlawful employment practice). Under this provision, it is "mandatory" that a plaintiff file a charge within the requisite days after the "unlawful employment practice" "occurred," or "lose the ability to recover for it." *Morgan*, 536 U.S. at 109-10.

1. The Court has long recognized that section 706(e) "reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Ricks*, 449 U.S. at 260 (internal quotation marks omitted). Section 706(e) "protect[s] employers from the burden of defending claims arising from employment decisions that are long past." *Id.* at 256-57. Indeed, the Court has held that an employer is "entitled to treat [a] past [discriminatory] act as lawful after [the employee] failed to file a charge of discrimination" within the prescribed period. *Evans*, 431 U.S. at 558.

In so holding, the Court has recognized that, as an *administrative* filing requirement, section 706(e) not only "assures prompt notification to the employer of a charge of an alleged violation of Title VII," *Int'l Union of Elec., Radio & Mach. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 240 n.14 (1976), but also "promote[s] conciliation rather than litigation in the Title VII context," *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998). Section 706(e) "bring[s] to bear," as promptly as possible, "the voluntary compliance and conciliation functions of the EEOC," *Bowe*

v. Colgate-Palmolive Co., 416 F.2d 711, 720 (7th Cir. 1969), and thereby "promot[es] . . . dispute resolution through accommodation rather than litigation . . . ." *Weise v. Syracuse Univ.*, 522 F.2d 397, 412 (2d Cir. 1975) (citing Henry J. Friendly, *Federal Jurisdiction: A General View* 78 (1973)).

The Court has stated that "[b]y choosing what are obviously quite short deadlines [in Title VII], Congress clearly intended to encourage the prompt processing of all charges of employment discrimination." *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980). Indeed, the Court has recognized that section 706(e) and its prompt filing requirement were a critical part of the legislative "compromise" leading to the enactment of Title VII, *id.* at 826, and has admonished lower courts to "strict[ly] adher[e]" to it. *Morgan*, 536 U.S. at 108.

2. To honor section 706(e)'s text and fulfill its statutory purposes, the Court has repeatedly stressed the need both to identify at the outset the specific "unlawful employment practice" at issue and to determine when that practice "occurred." *Id.* at 109-10; *see also Lorance*, 490 U.S. at 904; *Ricks*, 449 U.S. at 257-58. In doing so, the Court has repeatedly held that section 706(e) bars a private plaintiff from pursuing an intentional discrimination claim based wholly on conduct occurring outside of the charge-filing period, even if the past conduct continues to have adverse effects in the charge-filing period. *See, e.g., Lorance*, 490 U.S. at 905-08; *Ricks*, 449 U.S. at 257.

a. The Court first addressed this matter in *United Air Lines v. Evans*. There, a female flight attendant claimed that her pay and benefits were unlawfully depressed because she had previously been forced to resign pursuant to an illegal policy prohibiting flight attendants from being married. *See* 431 U.S. at 554, 558. Specifically, Evans had resigned in 1968, but was rehired in 1972 after the illegal policy was abolished. *See id.* at 554-55. However, on

rehire, pursuant to a collective bargaining agreement, Evans' employer did not credit her with seniority for prior service, and thus her pay and benefits were adversely affected. *See id.* at 555 & n.6. Evans claimed that the employer was violating Title VII by "giv[ing] present effect to the past illegal act" and was unlawfully "perpetuat[ing] the consequences of forbidden [past] discrimination." *Id.* at 557.

In rejecting Evans' claim, the Court began by stating that "the critical question is whether any present *violation* exists." *Id.* at 558 (emphasis in original). The Court answered that question in the negative on the ground that the employer's seniority system was "neutral in its operation." *Id.* The Court further noted that Evans did not allege that the seniority system "discriminate[d] against former female employees or that it treat[ed] former employees who were discharged for a discriminatory reason any differently from former employees who resigned or were discharged for a non-discriminatory reason." *Id.*

The Court recognized that the seniority policy had a "continuing impact on [Evans'] pay and fringe benefits" and gave "present effect to [the employer's] past act of discrimination." *Id.* But the employer "was entitled to treat that past act as lawful after [Evans] failed to file a charge of discrimination within the [limitations period] allowed" by section 706(e). *Id.* The Court said that the discriminatory act in 1968, which was "not made the basis for a timely charge," was "merely an unfortunate event in history" that had "no *present* legal consequences." *Id.* (emphasis added).

b. The Court next addressed the issue in *Delaware State College v. Ricks*. There, a black college professor was denied tenure by Delaware State College. *See* 449 U.S. at 252. Following its "policy of not discharging immediately a junior faculty member who does not receive tenure," the College communicated the tenure denial decision and offered Ricks a "'terminal' contract to teach one additional year," which he accepted. *Id.* at 253. Ricks waited until more than

180 days after the denial of tenure, but shortly before his one-year terminal contract expired, to file a Title VII charge. *See id.* at 254. This Court held that Ricks' claim was untimely. *See id.* at 262.

The Court emphasized that determining the timeliness of Ricks' claim "requires . . . identify[ing] *precisely* the 'unlawful employment practice' of which he complains." *Id.* at 257 (quoting 42 U.S.C. § 2000e-5(e)) (emphasis added). The Court found that Ricks was claiming intentional discrimination by the College in denying him tenure. *See id.* at 257-58. The Court thus concluded that the alleged intentional discrimination "occurred—and the filing limitations period[] therefore commenced—at the time the tenure decision was made and communicated to Ricks," more than 180 days before his charge. *Id.* at 258.

The Court acknowledged that one of the "*effects* of the denial of tenure—the eventual loss of a teaching position—did not occur until later." *Id.* (emphasis in original). But, to the Court, Ricks' termination was simply the "delayed" but "inevitable[] consequence of the denial of tenure." *Id.* at 257-58. Indeed, the Court noted that, for the limitations period to have run from the date that his contract expired, "Ricks would have had to allege and prove that the manner in which his employment was terminated differed discriminatorily from the manner in which the College terminated other professors who also had been denied tenure." *Id.* at 258. The Court reiterated that "[i]t is simply insufficient for Ricks to allege that his termination gives present effect to [a] past illegal act and therefore perpetuates the consequences of forbidden discrimination." *Id.* (internal quotation marks omitted).

c. The Court again spoke to the issue in *Lorance v. AT&T Technologies, Inc.* In that case, the Court considered "when the limitations period begins to run in a lawsuit arising out of a seniority system not alleged to be discriminatory on its face or as presently applied" that was

allegedly adopted for a discriminatory purpose outside of the limitations period. 490 U.S. at 903. The plaintiffs in *Lorance* did not allege that, within the limitations period, the facially neutral seniority system "treat[ed] similarly situated employees differently or that it [was] operated in an intentionally discriminatory manner." *Id.* at 905. Rather, the plaintiffs were alleging that the seniority system had been adopted for the discriminatory purpose of favoring male over female employees. *See id.* Because that alleged discriminatory act occurred "well outside the period of limitations," the Court ruled that the plaintiffs' claims were "time barred under § 706(e)." *Id.* at 906.

The Court explained that its "cases have rejected" the "alternative approaches" put forth by the plaintiffs. *Id.* The Court noted that it had twice before rejected the theory that an employer is "guilty of a continuing violation which 'occurred,' for purposes of § 706(e), not only when the" seniority system was discriminatorily adopted, "but also when each of the concrete effects" of that adoption "was felt." *Id.* And the Court pointed to other decisions holding that section 703(h) of Title VII bars disparate impact claims based on the continuing adverse effects of a seniority system. *See id.* at 908-09.

The *Lorance* Court also rested its conclusion on its decision in *Machinists Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 413-14 (1960). Although *Machinists* arose under the National Labor Relations Act ("NLRA"), the *Lorance* Court found that the NLRA "was the model for Title VII's remedial provisions" and has a similar charge-filing period. 490 U.S. at 909-10. The *Lorance* Court further found that *Machinists* had "considered and rejected an approach to the limitations period identical to that advanced" by the plaintiffs in *Lorance*. *Id.* at 910. Specifically, the *Machinists* Court had held that where "'a complaint based upon [an] earlier event is time-barred,'" to "'permit the event itself' 'to cloak with illegality that which was otherwise lawful' 'in effect results in reviving a legally defunct unfair

labor practice,'" and in essence nullifies the limitations period altogether. *Id.* at 911 (quoting *Machinists*, 362 U.S. at 417). The Court in *Lorance* found this reasoning "squarely in point": "Because the claimed invalidity of the facially nondiscriminatory and neutrally applied . . . seniority system" in *Lorance* was "wholly dependent on the alleged illegality" of its adoption, "the date of that [adoption] governs the limitations period." *Id.*

d. The Court most recently reaffirmed this reasoning—and its construction of section 706(e)—in *National Railroad Passenger Corp. v. Morgan.* The plaintiff in *Morgan* alleged that he had been subject to discrete discriminatory and retaliatory acts by his employer and had experienced a racially hostile work environment. *See* 536 U.S. at 104. While some of the alleged discriminatory acts occurred within the charge-filing period, others took place prior to that period. *See id.* at 106. In determining which, if any, of these claims had been timely asserted, the Court reiterated that "[t]he critical questions" are "[w]hat constitutes an 'unlawful employment practice' and when has that practice 'occurred'?" *Id.* at 110.

As to discrete acts, "such as termination, failure to promote, denial of transfer, or refusal to hire," the Court ruled that each discrete "incident of discrimination . . . constitutes a separate actionable 'unlawful employment practice'" that "starts a new clock for filing charges alleging that act." *Id.* at 113, 114. The Court held that each such act "'occurred' on the day that it 'happened,'" and that a plaintiff "must file a charge within either 180 or 300 days of the date of the act or lose the ability to recover for it." *Id.* at 110. The Court rejected Morgan's argument that the term "practice" in section 706(e) "converts related discrete acts," including those occurring outside the limitations period, "into a single unlawful practice for the purposes of timely filing." *Id.* at 111. Rather, discussing *Evans* and *Ricks*, the Court reaffirmed that "discrete acts that fall within the statutory time period do not make timely acts that fall

outside the time period." *Id.* at 112. The Court held that, while the existence of discriminatory acts outside the limitations period "does not bar employees from filing charges about related discrete acts" within the charge-filing period, the plaintiff must allege present acts that "are *independently* discriminatory" and must file a "timely" charge "addressing those acts." *Id.* at 113 (emphasis added). The "emphasis" is on whether any "present" and "independently" actionable "violation existed." *Id.* at 112-13 (internal quotation marks and emphasis omitted).

In contrast, the Court found that "[h]ostile environment claims" must be treated differently. *Id.* at 115. The Court determined that, because the "very nature" of a hostile environment claim "involves repeated conduct" and "the cumulative effect of individual acts," the "'unlawful employment practice'" cannot "be said to occur on any particular day." *Id.* Rather, the Court found that, "in direct contrast to" a discrete discriminatory act, "a single act of harassment may not be actionable on its own," *id.*, and that "[a] hostile work environment claim is," by its nature, "composed of a series of separate acts that collectively constitute one 'unlawful employment practice.'" *Id.* at 117 (quoting 42 U.S.C. § 2000e-5(e)(1)). Accordingly, the Court concluded that "the entire time period of the hostile environment may be considered by a court," "[p]rovided that an act contributing to the claim occurs within the filing period." *Id.*

On this analysis, the Court determined that, while Morgan's hostile environment claim was timely, his claims concerning "discrete discriminatory acts" occurring prior to the charge-filing period were not. *Id.* at 114-15, 120-21. Reaffirming that "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law," the Court held that those claims were "no longer actionable." *Id.* at 108, 115 (internal quotation marks omitted).

B. Ledbetter's Intentional Pay Discrimination Claim Is Time-Barred Because She Challenges The Present Effects of Salary Decisions Occurring Outside Of The Charge-Filing Period.

These cases confirm that the court below correctly held that Ledbetter's intentional pay discrimination claim is time-barred. Ledbetter was entitled to pursue her claim of intentional pay discrimination concerning acts occurring during the 180-day charge-filing period. But she was not entitled to base that claim on acts occurring outside of the period.

First, as Ledbetter necessarily concedes (Pet. Br. at 13, 18, 22, 32), her intentional pay discrimination claim challenges "discrete" acts within the meaning of *Morgan*. *Morgan* itself referred to pay discrimination claims as concerning discrete acts. *See* 536 U.S. at 111-12. Moreover, as the court below explained (Pet. App. 17a-18a), a plaintiff alleging intentional pay discrimination "must point to some specific, conscious conduct that was tainted" by unlawful discrimination. Whether a plaintiff challenges a "decision[] setting the plaintiff's salary" or "the issuance of a confirming paycheck" as "the operative act of discrimination," that act is, "'like termination, failure to promote, denial of transfer, or refusal to hire,' . . . discrete in time, easy to identify, and—if done with the requisite intent—independently actionable." Pet. App. 18a (quoting *Morgan*, 536 U.S. at 114). Indeed, because the "'unlawful employment practice' *can be* said to occur on a particular day," and "a single discriminatory act *is* actionable on its own," intentional pay discrimination claims lack "those characteristics that led the Court to devise a separate rule governing the timing of hostile work environment claims." Pet. App. 18a (emphasis added). Rather, each discrete act of alleged pay discrimination "starts a new clock for filing charges," and a plaintiff must file a charge within 180 days of that act "or lose the ability to recover for it." *Morgan*, 536 U.S. at 110, 113.

Second, though she characterizes the paychecks received during and after the 180-day period as the product of intentional discrimination, Ledbetter has no cognizable claim that any intentional discrimination occurred during the charge-filing period. The Eleventh Circuit held that Ledbetter did not have legally sufficient evidence that the single salary decision made during the charge-filing period was motivated by gender (Pet. App. 31a), and Ledbetter did not seek or obtain certiorari on that question. Moreover, Ledbetter offered no evidence that the paychecks received during that period were themselves issued with discriminatory intent; on the contrary, Goodyear's payroll system mechanically implements the salary determinations made pursuant to the merit-based compensation system, and the resulting paychecks are simply the "inevitable[] consequence[s]" of earlier pay decisions. *Ricks*, 449 U.S. at 257-58.

Ledbetter is thus left to complain that, by taking her existing salary as the starting point for determining the salary to pay her during the charge-filing period, Goodyear perpetuated the effects of earlier salary decisions. But Ledbetter offered no evidence that, during the charge-filing period, Goodyear knowingly relied on those decisions "'because of,'" as opposed to "'in spite of,'" their allegedly discriminatory purpose. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). On the contrary, the facts are undisputed that Goodyear had no discriminatory purpose: under the "Pay for Performance" program, taking existing salary as the starting point for present salary decisions was a facially neutral practice applied to all men and women alike. J.A. 69-70, 87-88, 120-21; Tr. 256-57, 344, 351. There is no evidence that Goodyear discriminatorily administered that facially neutral practice. And Ledbetter has never advanced a claim that this facially neutral practice, used by almost all private- and public-sector employers, was maintained with a discriminatory purpose or had an unlawful disparate impact on women. Rather, Ledbetter simply claims that her salary

during the charge-filing period reflected the lingering effects of allegedly discriminatory decisions made outside of the charge-filing period by various supervisors. This is precisely the kind of stale "perpetuation" claim that *Evans, Ricks, Lorance,* and *Morgan* hold is too late to bring. *See Morgan*, 536 U.S. at 112-13; *Lorance*, 490 U.S. at 906-07; *Ricks*, 449 U.S. at 258; *Evans*, 431 U.S. at 558; *see also Chardon v. Fernandez*, 454 U.S. 6, 7-8 (1981) (per curiam).

There is no basis for applying a different charge-filing rule to discrete acts of intentional pay discrimination than to other discrete acts like hiring, promotion, assignment, and termination. The statutory text draws no distinction between pay claims and those other kinds of claims, and *Morgan* itself mentions pay claims in describing the limitations rule applicable to discrete acts of alleged discrimination. *See Morgan*, 536 U.S. at 112-13. Moreover, a pay decision is no more or less discrete, and no more or less continuous, than an act of termination, failure to promote, denial of transfer, or the like. With respect to all, a decision is made and is then implemented; with respect to all, the employer can generally change the decision at any time or leave it as initially made. The employer reaffirms a pay decision no more or less than any of the other kinds of decisions by allowing it to take effect in subsequent time periods; an employer continues to carry out, for example, a failure to promote or denial of transfer by continuing to employ an individual in one capacity rather than another at a specified rate of pay and benefits. In fact, these other decisions are defined, in whole or in part, by the pay associated with them. There is no principled or manageable basis for applying different charge-filing rules to these various kinds of discrete employment decisions (or, to the extent that a decision is in part defined by a pay change, two charge-filing rules to the same decision).

Finally, to allow Ledbetter to bring such an untimely intentional discrimination claim would completely defeat section 706(e)'s twin goals of protecting defendants and

courts from the hazards of stale claims and of encouraging prompt conciliation instead of delayed litigation. Ledbetter's late-filed claim is contrary to both statutory purposes.

Here, there was little information available at trial in 2003 about the determinations made regarding Ledbetter's salary between 1979 and 1992 and about her comparative performance during that time. Yet most of the shortfall of which Ledbetter complains arose during that time. J.A. 166, 195. Moreover, Mike Maudsley, who Ledbetter claimed at trial was responsible for the alleged discrimination against her in the 1980's, was deceased by the time of trial. Allowing Ledbetter to base a present liability claim on such long-past acts—particularly when the record demonstrates that she knew by no later than 1982 how to avail herself of the EEOC charge-filing process, and that she knew by no later than 1992 of a disparity between her salary and those of some male Area Managers—would authorize precisely the sort of litigation over stale claims that section 706(e) seeks to prevent.

Moreover, permitting such stale claims would impose wholly unfair risks and burdens on employers. In order to avoid and/or defend against such claims, employers would annually have to investigate all prior salary decisions and attempt to determine whether or not they were based solely on non-discriminatory factors. In many circumstances, documents relevant to such investigations would no longer exist, as record retention laws have limited timeframes and limited scope, *see, e.g.*, 29 C.F.R. § 1602.14 (2006); *see also* Pet. Br. at 28 n.14, and as the burdens of keeping records for long periods can be substantial. Moreover, documents rarely tell the entire story, and yet relevant witnesses will often have moved on, retired, or died, or simply will no longer remember critical facts. Further, as former Justice Marshall once noted, "acts that may constitute Title VII violations are generally effected through the actions of individuals," not through "company[-]wide discriminatory policies violative of Title VII," and those individuals "often" may "take . . .

step[s] even in defiance of company policy" prohibiting discrimination. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 75 (1986) (Marshall, J., concurring). In short, past intentional discrimination frequently is unknown to the current management of an employer like Goodyear, and often will be difficult if not impossible to uncover.

In sum, it would be extraordinarily improper to permit Ledbetter's stale intentional pay discrimination claim to go forward. That claim could have previously been brought in a timely manner. It was not. It is based on allegations that a deceased prior manager or other such individual managers may have acted some years earlier in a discriminatory manner in defiance of company policy. This Court has consistently construed section 706(e) to bar private plaintiffs from bringing such untimely claims.

II. *BAZEMORE v. FRIDAY* DOES NOT AUTHORIZE AN INTENTIONAL PAY DISCRIMINATION CLAIM BY A PRIVATE PARTY CONCERNING ALLEGED DISCRIMINATION OCCURRING OUTSIDE OF THE CHARGE-FILING PERIOD.

In arguing that she may bring an intentional pay discrimination claim based on the effects of decisions made outside of Section 706(e)'s charge-filing period, Ledbetter and her amici rely almost exclusively on snippets of language from this Court's decision in *Bazemore*. But *Bazemore* involved a claim by the United States that could not previously have been brought; that was not subject to section 706(e); and that concerned intentional discrimination in pay that allegedly was continuing. Section 706(e) was not in issue; and there was no claim, much less a holding, that a present intentional pay discrimination claim by a private party could rest entirely on actions taken outside of the charge-filing period. *Bazemore* simply is not proper authority for the kind of untimely intentional pay discrimination claim that Ledbetter seeks to pursue.

A. *Bazemore* Involved Allegations By The United States Of Present Intentional Discrimination; And This Court Merely Rejected The Employer's Defense That The Claim Was Barred Because The Alleged Discrimination Began Before Title VII's Effective Date.

At issue in *Bazemore* were the pay practices of the North Carolina Agricultural Extension Service after 1972, when Title VII first became applicable to public employers. The case came to the Court on a record showing that, until August 1, 1965, when Title VII became effective for private employers, the Extension Service had been "divided into two branches: a white branch and a 'Negro branch.'" *Bazemore*, 478 U.S. at 390. "The white branch employed no blacks . . . ." *Id.* "The 'Negro branch' was composed entirely of black personnel and served only black farmers, homemakers, and youth." *Id.* The Extension Service openly paid blacks less than whites who performed the same work in these two branches. *See id.* While the Extension Service "merged the two branches . . . into a single organization" on August 1, 1965, it did not, going forward, change its practice of paying blacks at a lower rate than whites. *Id.* at 390-91. Rather, after 1965, the Extension Service made annual salary adjustments "on a nondiscriminatory basis," but maintained the institutionally segregated base salaries created by the facially discriminatory, pre-1965 salary practices. *Bazemore v. Friday*, 751 F.2d 662, 666 (4th Cir. 1984).

The United States alleged that, in compensating black employees after 1972, the Extension Service was, for discriminatory purposes, knowingly and intentionally continuing the institutionally segregated salaries that previously had been established. *See id.* at 671. The district court found that the weight of the evidence did not support the United States' claim. *See id.* at 665-66, 671-72. A Fourth Circuit panel affirmed, holding that the United States' claim was barred because the alleged salary discrimination had begun prior to the statute's effective date, and further

holding that the United States' evidence—and, in particular, its regression analysis—was legally insufficient to establish intentional pay discrimination after 1972. *See id.* at 670-74. Judge Phillips wrote a vigorous dissent on both counts. *See id.* at 689-96 (Phillips, J., dissenting) (describing evidence of intentional discrimination after 1972, including "weighty" testimonial "evidence of knowing, intentional continuation of acknowledged discriminatory [salary] policies").

In this Court, the United States again argued that, although the Extension Service first decided "to pay black employees less than whites for the same work . . . before Title VII became applicable to public employers," the Extension Service's "compensation scheme remained *intentionally* discriminatory" after 1972. Br. for the Federal Petitioners, *Bazemore v. Friday*, 1985 WL 669751, at *20 n.18 (emphasis added). The United States argued that the post-1972 salary practices violated Title VII not because there was a mere continuation of the pre-1972 "disparity in salaries," *id.*, but because the Extension Service "ha[d] *purposely* continued [its] discriminatory system subsequent to the enactment of Title VII." Reply Br. for the Federal Petitioners, *Bazemore v. Friday*, 1986 WL 728399, at *4-*5 (emphasis added). Indeed, the United States argued that, "[r]ather than simply failing to remedy the effect of a discrete pre-Act discriminatory action, the [Service] continu[ed] its intentional discrimination on the basis of race." *Id.* at *5. The amicus briefs filed in *Bazemore* reflected this same understanding of the facts and allegations in the case. *See, e.g.*, Br. of the AFL-CIO as Amicus Curiae Supporting Petitioners, *Bazemore v. Friday*, 1986 WL 728218, at *10 (arguing that the United States had "shown that the employer . . . maintained [a] race-skewed differential *with discriminatory intent*") (emphasis added).

This Court reversed, both with regard to whether the origin of the salary disparities could serve as a defense to the United States' claim, and with regard to the evaluation of the United States' evidence of intentional discrimination in pay

after 1972. *See Bazemore*, 478 U.S. at 386-87. As the United States did in its briefs, Justice Brennan's concurring opinion (joined by all members of the Court) stressed that the "'critical question'" is "'whether any *present violation* exists.'" *Id.* at 396 n.6 (quoting *Evans*, 431 U.S. at 558) (emphasis in *Bazemore*). Justice Brennan distinguished *Evans* and *Hazelwood School District v. United States*, 433 U.S. 299 (1977), on the ground that, in those cases, "the employer was not engaged in discriminatory practices at the time [of] suit." 478 U.S. at 396 n.6. Justice Brennan stated that, in *Bazemore*, in contrast, the United States had alleged that the employer did "*not* from the date of the Act forward 'ma[ke] all [of its] employment decisions in a wholly nondiscriminatory way.'" *Id.* (quoting *Hazelwood*, 433 U.S. at 309) (emphasis in original). And, finally, Justice Brennan explained the errors that the court of appeals had committed in evaluating whether the post-1972 salary decisions were made because of, rather than in spite of, race. *See id.* at 397-404.

In short, contrary to Ledbetter and her amici, the Court in *Bazemore* had no occasion to hold that section 706(e) allows a private plaintiff to bring an intentional pay discrimination claim concerning present pay disparities that are merely the result of pay decisions made outside of the charge-filing period. The United States is not subject to section 706(e) or any other statute of limitations under Title VII, *see Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 361 (1977), and section 706(e) thus was not even at issue in *Bazemore*. Moreover, *Bazemore* did not involve a claim that previously could have been but, as here, was not timely brought. Indeed, there is an obvious difference between pre-Act discrimination and discrimination against an employee which occurs outside the charge-filing period. In the former situation, a finding that deliberate perpetuation of pre-Act discrimination is permissible would "have the effect of exempting from liability those employers who were historically the greatest offenders of the rights of blacks."

Bazemore, 478 U.S. at 395. In contrast, discrimination prior to the charge-filing period is in no way exempt from Title VII's reach because employees (and/or the Government) can timely avail themselves of the statute's protections.

In any event, in contrast to Ledbetter's claim here, the United States did not claim in *Bazemore* that unlawful pay discrimination could be established wholly by reference to allegedly discriminatory acts occurring outside of an applicable limitations period—much less acts that could have been, but were not, made the subject of a timely charge. Rather, the United States asserted in *Bazemore* that the challenged pay practices reflected ongoing intentional discrimination by the Extension Service itself. That claim of ongoing intentional pay discrimination by the Extension Service post-1972 was the claim that the Court held could be pursued (and was not barred simply because the alleged discriminatory policy and practice had been initiated before Title VII's effective date). Indeed, that was the claim with respect to which the Court further held that the Fourth Circuit had erred in evaluating the proof of the Extension Service's continuing discriminatory intent—proof that would have been irrelevant if the post-1972 salary disparities were themselves sufficient to establish a present claim. The claim of present, continuing, intentional discrimination was key to *Bazemore*. *See id.* ("A [pre-Act discriminatory] pattern or practice . . . became a violation upon Title VII's effective date, and *to the extent an employer continued to engage* in that act or practice, it is liable under that statute.") (emphasis added). But Ledbetter has no such claim here.

This Court's decision in *Lorance* confirms this understanding of *Bazemore*. In *Lorance*, the Court held that a claim of intentional discrimination in the adoption of a seniority system was untimely when not filed within 180 days of the adoption of that system, even though the resulting facially neutral seniority system was applied within the charge-filing period. The *Lorance* Court distinguished *Bazemore* on the ground that *Bazemore* did not involve a

claim merely concerning the present effects of past intentional discrimination. *See Lorance*, 490 U.S. at 913 n.5. Rather, consistent with the briefing and opinion in *Bazemore*, the *Lorance* Court described *Bazemore* as a case involving allegations of intentional discrimination that occurred after the effective date of Title VII—specifically, what the Court in *Lorance* described as intentional discrimination arising from the application of a "facially discriminatory" pay policy that "discriminates each time it is applied." *Id.* But, as the Question Presented here makes clear, the claim in this case does not concern allegations of facial discrimination, or any other kind of intentional discrimination, within the limitations period. Thus, as understood by this Court in *Lorance*, *Bazemore* cannot properly be said to authorize Ledbetter's claim.

In short, *Bazemore* held only that an employer could not defend the continuation of racially segregated salaries for discriminatory purposes by pointing out that the discrimination began pre-Act. *Bazemore* does not support Ledbetter's sweeping assertion that nondiscriminatory implementation of a facially neutral system can somehow constitute unlawful discrimination simply because there were discriminatory departures from that neutral policy by individual supervisors in the past. Any such rule would run headlong into both *Lorance*'s interpretation of *Bazemore* and the settled principle that acts within the charge-filing period are not actionable simply because they perpetuate the effects of prior discriminatory acts.

B. Ledbetter Misconstrues Snippets Of Language In Justice Brennan's *Bazemore* Concurrence.

In arguing to the contrary, Ledbetter and her amici seize upon snippets of language in Justice Brennan's concurring opinion in *Bazemore*. They claim that this language supports two broader, alternative understandings of *Bazemore*. But the language that they seize upon cannot sustain the legal rule that they seek to create.

1. Ledbetter initially argues (Pet. Br. 3, 20-22) that her claim is timely presented because, under Justice Brennan's opinion in *Bazemore*, each "week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII . . . ." *Bazemore*, 478 U.S. at 395. But that language has no proper application to Ledbetter's claim here.

As explained above, unlike this case, *Bazemore* involved allegations of *present* intentional discrimination—to wit, the alleged maintenance of institutionally segregated pay rates for a discriminatory purpose. Moreover, in *Bazemore*, the employer sought to defend against those allegations by asserting that the discriminatory pay structure had been created before the effective date of the statute. It was in this context that Justice Brennan stated that "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." 478 U.S. at 395-96.

Contrary to Ledbetter and her amici, the "[e]ach week's paycheck" language cannot properly be understood apart from the context in which it was written. The emphasis in the sentence itself is on an illegal "pattern" of intentional pay discrimination begun before, and allegedly continued after, the statute's effective date. *Id.* at 395. The opinion goes on to reiterate that, under *Evans* and *Hazelwood*, the "'critical question'" is "'whether any *present violation* exists.'" *Id.* at 396 n.6 (quoting *Evans*, 431 U.S. at 558) (emphasis in *Bazemore*). Thus, in *Bazemore*, the alleged maintenance of institutionally segregated pay rates for a discriminatory purpose after 1972 constituted the requisite "present violation" and, if proved, would render each paycheck issued an intentionally discriminatory, independently actionable act that violated Title VII (and that was not subject to a statute of limitations when challenged by the United States). But Justice Brennan did not suggest that, absent sufficient evidence of present intentional discrimination, paychecks

delivering different amounts to black and white employees would by themselves constitute a violation of Title VII; on the contrary, the next part of Justice Brennan's opinion proceeds from the premise that legally sufficient evidence of present intentional discrimination was required. *See id.* at 397-404. Thus, in distinguishing the same "[e]ach week's paycheck" language, the *Lorance* Court stressed that the limitations inquiry "focuses on the timing of the *discriminatory* acts . . . ." *Lorance*, 490 U.S. at 913 n.5 (emphasis in original).

Here, there is no comparable argument that Goodyear maintained institutionally segregated pay rates for a discriminatory purpose within the charge-filing period. The Eleventh Circuit found no evidence of intentional discrimination in pay during the charge-filing period, in either the salary rate decision or the issuance of paychecks. Pet. App. 31a. Moreover, while Ledbetter complains that her salary within the charge-filing period reflects the effects of past, allegedly discriminatory decisions by individual managers, Ledbetter has never adduced evidence that, during the charge-filing period, Goodyear perpetuated the base rate of her salary with the *purpose* of discriminating against her. *See Feeney*, 442 U.S. at 279 (question is whether defendant made the challenged decision "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon" women). On the contrary, the use of existing salary as the base pay rate is part of Goodyear's facially neutral "Pay for Performance" program, which is applied to all men and women alike. J.A. 69-70, 87-88, 120-21; Tr. 256-57, 344, 351. In short, as the Question Presented presumes, there is no present intentional discrimination at issue here, and the lack of any *present* intentional discrimination renders the "[e]ach week's paycheck" language wholly inapplicable.

2. Ledbetter alternatively argues that *Bazemore* recognized an "'obligation'" on the part of employers to "'eradicate salary disparities based on race'" or sex even if the disparity arose outside the limitations period. Pet. Br. at

42 (quoting *Bazemore*, 478 U.S. at 397). Once again, Ledbetter is improperly stripping the language of Justice Brennan's opinion from the context in which it was used.

As explained above, in *Bazemore*, the Extension Service employed a facially discriminatory compensation system before 1965, segregating blacks and whites into two separate branches and paying blacks less than whites who performed the same work. *See Bazemore*, 478 U.S. at 390. Although the Extension Service combined the two branches in 1965, it continued thereafter, allegedly for discriminatory purposes, to pay blacks and whites completely different salaries for the same work, and even continued doing so after Title VII became effective for public employers in 1972. It was in this context—of a prior facially discriminatory pay policy creating institutionally segregated salaries that were allegedly continued for discriminatory purposes—that Justice Brennan made the statement that "the Extension Service was under an obligation to eradicate salary disparities based on race that began prior to the effective date of Title VII . . . ." *Id.* at 397.

Contrary to Ledbetter and her amici, the "obligation to eradicate salary disparities based on race" language cannot properly be applied without regard to whether the case involves institutionally segregated salaries that arose from a facially discriminatory pay structure and that were allegedly continued for intentionally discriminatory purposes. In the same breath in *Bazemore*, Justice Brennan reiterated that the United States was "alleging that in continuing to pay blacks less than similarly situated whites, respondents have *not* from the date of the Act forward 'made all [their] employment decisions in a wholly nondiscriminatory way.'" *Id.* at 396 n.6 (quoting *Hazelwood*, 433 U.S. at 309) (emphasis and brackets in *Bazemore*). Justice Brennan further reiterated that the Court's decision "in no sense gives legal effect to the pre-1972 actions, but, consistent with *Evans* and *Hazelwood*, focuses on the present salary *structure*, which is illegal if it is a mere continuation of the

pre-1965 discriminatory pay *structure*." *Id.* (emphasis added). And Justice Brennan went on to evaluate the evidence of the alleged continuing discriminatory purpose—an evaluation that, again, was unnecessary if there was an unqualified obligation to eliminate any disparities attributable to past discrimination. *See id.* at 397-404. In other words, Justice Brennan tied the "obligation to eradicate salary disparities based on race" language to institutionally segregated salaries (arising from a prior facially discriminatory pay structure) that allegedly were purposefully continued, because of race, into the present, actionable time period. Justice Brennan did not purport to be establishing an untethered obligation to identify and correct all present effects of past intentional discrimination by any supervisor, whether known or unknown to the employer, whether continued with discriminatory purpose or not, and whether subject to section 706(e) or not.

Here, of course, Goodyear's compensation system was facially neutral. Pet. Br. at 5, 48. Ledbetter received the same starting salary as male supervisors. J.A. 39, 151-52. She was subject to the same salary adjustment rules as were male employees—including the rule that each year's salary decision took existing salary as a given and only provided an adjustment up to a maximum percentage increase. J.A. 69-70, 87-88, 120-21; Tr. 256-57, 344, 351. Further, Ledbetter received larger percentage salary adjustments in some years than did male supervisors (Pet. App. 5a-6a; J.A. 174, 193); and she admitted that at least one of her managers, Mike Nunn, did not discriminate against her in her pay between 1990 and 1992 (Tr. 132-33). Thus, unlike in *Bazemore*, where it was undisputed that the Extension Service facially discriminated against all blacks in compensation until 1965, and it was alleged that the Extension Service continued these segregated compensation rates thereafter for intentionally discriminatory purposes, here there were no alleged "male" and "female" pay rates for Goodyear to dismantle and eradicate. Rather, here, Ledbetter is merely complaining that

individual managers sometimes adjusted her salary on a discriminatory basis years before she filed her EEOC charge. Justice Brennan's "obligation to eradicate" language was aimed at the Extension Service's facially discriminatory pay structure and the purposeful continuing use of the institutionally segregated pay rates that arose from it; that language was not aimed at the kinds of isolated and discrete decisions by multiple lower-level managers at different points in time over a 19-year period that Ledbetter is challenging, and Justice Brennan's language cannot fairly be read to contemplate the sweeping and burdensome duty on employers that Ledbetter would impose.

Indeed, Ledbetter's argument that *Bazemore* recognized a continuing affirmative duty to eradicate the effects of all past intentional pay discrimination—whether known or unknown to the employer, whether continued for discriminatory reasons or not, whether untimely under section 706(e) or not—cannot be reconciled with the language and structure of Title VII. Such a duty is contrary to section 706(e) and this Court's holding that it forecloses claims based on mere "perpetuati[on]" of effects. *Evans*, 431 U.S. at 557. Such a duty would also wrongly transform section 703(a)(1)'s *prohibition* on discrimination into a requirement of affirmative conduct by employers, akin to the leave requirements of the Family and Medical Leave Act, the reasonable accommodation requirements of the Americans with Disabilities Act, and other provisions of so-called "minimum employment standards" statutes. Such a duty would contravene section 703(j) of Title VII, 42 U.S.C. § 2000e-2(j), which provides that nothing contained in Title VII "shall be interpreted to require any employer . . . to grant preferential treatment to any . . . group . . . on account of" a *de facto* imbalance in the employer's work force. And such a duty would conflict with the Bennett Amendment set forth in section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), which makes the Equal Pay Act, not Title VII, the governing law for claims about gender-related pay practices that are not

presently intentionally discriminatory. *See Gunther*, 452 U.S. at 170-71.

3. In sum, the language that Ledbetter and her amici seize upon in Justice Brennan's opinion in *Bazemore* need not and should not be read as they suggest. While the language has potentially broad implications when read in isolation, the language is of much more limited significance when read in the context of the facts, allegations, and opinion to which it is tied. Moreover, the language—as construed by Ledbetter and her amici—plainly goes beyond the limited holding of *Bazemore* (concerning whether the Extension Service could defend against the United States' claim by showing that the challenged disparity had its origins in pre-Act discrimination); and this Court has repeatedly said that "[i]t is to the holdings of our cases, rather than their dicta, that we must attend." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379 (1994). Indeed, the Court has warned against "dissect[ing]" the language of its prior opinions "as though they were the United States Code." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993). That warning is particularly apt here, since the broader understandings of Justice Brennan's language that Ledbetter and her amici urge directly conflict with the Court's decisions in *Evans*, *Ricks*, *Lorance*, and *Morgan*—all of which reject the notion that Title VII allows private plaintiffs to base intentional discrimination claims on discrete acts occurring outside of the charge-filing period. The Court should decline Ledbetter's invitation to create such a conflict between its cases.

III. LEDBETTER'S REMAINING ARGUMENTS ARE ALSO IN ERROR.

In addition to her erroneous construction of *Bazemore*, Ledbetter offers four other arguments for construing Title VII to allow her untimely claim. Each argument is flawed.

A. Ledbetter's Empirical And Policy Arguments Wrongly Ask The Court To Rewrite Section 706(e).

Ledbetter and her amici suggest that various empirical and policy considerations should cause the Court to construe section 706(e) to allow intentional pay discrimination claims challenging effects of past decisions. They assert that women are generally offered lower starting salaries than men; that employees, fearing retaliation, may be "understandabl[y]" "reluctan[t] to rock the boat" by promptly challenging pay decisions; and that employees may lack the incentives or information to challenge intentional pay discrimination until the "harm" from discrete salary decisions has "accumulat[ed]." *See* Pet. Br. at 22-29; Br. of Nat'l P'ship for Women & Families as Amicus Curiae In Support of Petitioner at 3. On the basis of these assertions, they further argue that alleged victims of discrimination should not be denied a remedy and that the equitable doctrine of laches and the two-year limit on backpay imposed by section 706(g)(1), 42 U.S.C. § 2000e-5(g)(1), "adequately protect[] employers' interest in avoiding stale claims." Pet. Br. at 28. But these arguments provide no legal basis for rewriting the statutory text that this Court has already authoritatively construed to the contrary.

First, the record of this case provides little support for the sweeping assertions that Ledbetter and her amici advance. Ledbetter started at the same salary as other male supervisors. J.A. 39, 151-52. In a number of years, she received larger percentage raises than her male co-workers. Pet. App. 5a-6a; J.A. 174, 193. While her absolute salary did not grow over time to the same extent as those of some male co-workers, she was on layoff early in her career when most of them were not, and she received lower performance evaluations in many years. Pet. App. 5a-7a, 9a; J.A. 174-77, 189-92. Moreover, while Ledbetter offered anecdotal testimony that Goodyear hired few other women supervisors at this plant and paid them less than it paid men, she did not

substantiate this speculation with supporting documents. Nor did she offer any of the qualified labor market data or appropriately controlled statistical studies that this Court has held are necessary to draw a legitimate inference of discrimination (particularly an inference of systemic discrimination). *See, e.g., Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650-58 (1989); *Hazelwood*, 433 U.S. at 307-13. Furthermore, early in her career, Ledbetter filed a charge of discrimination with the EEOC, J.A. 103-09—showing that at least some employees are willing promptly to assert their rights and that, when they do so, nonretaliatory responses and amicable resolutions are possible. In addition, although she waited until 1998 to file a charge alleging intentional pay discrimination, Ledbetter was aware, by no later than 1992, of a disparity between her salary and the salaries of some male supervisors, and, by 1995, had learned that this disparity was "a thousand [dollars] at least more per month . . . ." J.A. 231-32; *see also* J.A. 233, 236-37, 239-40. Indeed, Ledbetter testified that "[d]ifferent people that [she] worked for along the way had *always* told [her] that [her] pay was extremely low." J.A. 233 (emphasis added). Thus, by her own admissions, Ledbetter had notice of a substantial wage disparity—providing plenty of financial incentive for a claim—years before she first brought her intentional pay discrimination charge. Whatever the case may be more generally with respect to the "legislative facts" asserted, the record of this proceeding—*i.e.*, the conventional basis for drawing judicial inferences—paints a very different picture than has been suggested.

Second, the law already contains numerous provisions that address the concerns that Ledbetter and her amici raise. In addition to the substantive requirements of the Equal Pay Act and the prohibition on discrimination in compensation in section 703(a)(1) of Title VII, section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k), allows a prevailing Title VII plaintiff to recover reasonable attorneys' fees. That provision was intended to "make it easier for a plaintiff of limited means"

to obtain legal representation and "to bring a meritorious [discrimination] suit" even if the potential recovery is small. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 420 (1978) (internal quotation marks omitted). In addition, Title VII allows compensatory and punitive damages awards both as a further incentive for plaintiffs to bring meritorious cases and as a deterrent to employers from violating the law. *See* 42 U.S.C. § 1981a. Moreover, Title VII's anti-retaliation provision provides an employee with "broad protection" from retaliation "because that individual 'opposed any practice' made unlawful by Title VII or 'made a charge, testified, assisted, or participated in' a Title VII proceeding or investigation." *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2408, 2413 (2006) (quoting 42 U.S.C. § 2000e-3(a)). And the "time period for filing a charge [under section 706(e)] is subject to equitable doctrines such as tolling or estoppel" if appropriate circumstances, such as a defendant's concealment of the basis for a plaintiff's cause of action, are established. *Morgan*, 536 U.S. at 113; *see also Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982).

Third, at bottom, Ledbetter is asking this Court to rewrite the statute so that it will favor a plaintiff's right to challenge past acts of alleged discrimination over the interests served by section 706(e). But this Court has repeatedly rejected the argument that "strict adherence" to the requirements of section 706(e) is "'unfair' or that 'a less literal reading'" of section 706(e) would better effectuate the purposes of Title VII. *Morgan*, 536 U.S. at 108-09 (quoting *Mohasco*, 447 U.S. at 824-25).

It is true, of course, that strict adherence to section 706(e) will bar some claims that otherwise might be meritorious. But section 706(e) reflects Congress's judgment "concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Ricks*, 449 U.S. at 259-60 (internal quotation marks omitted). Particularly where

"Congress carefully prescribed a series of deadlines," reflecting a "compromise" essential to the enactment of Title VII as a whole, this Court "must respect" the choice "embodied in [Congress's] words," and may not "simply . . . alter the balance struck by Congress . . . by favoring one side or the other in matters of statutory construction." *Mohasco*, 447 U.S. at 825-26.

Furthermore, contrary to the impression that Ledbetter and her amici seek to create, honoring the balance struck by section 706(e) does not leave victims of intentional pay discrimination claims without a remedy. They can bring timely Title VII claims. Moreover, the EEOC and the United States can seek relief on their behalf, and are not subject to section 706(e). Perhaps even more importantly, women such as Ledbetter may bring claims under the Equal Pay Act, which is subject to a longer limitations period, *see* 29 U.S.C. § 255, and which focuses on the question of equal pay for "equal work," *id.* § 206(d)(1), rather than on stale questions of intent in past decisions in years gone by.

Finally, the defense of laches and the two-year limit on backpay in section 706(g)(1) do not adequately protect employers' interest in avoiding stale claims. "[A]n employer may raise a laches defense" "[i]n *addition* to other [available] equitable defenses" and the protection against stale claims afforded by a statute of limitations. *Morgan*, 536 U.S. at 121 (emphasis added). But "laches is not a *substitute* for a statute of limitations," 27A Am. Jur. 2d *Equity* § 148 (2d ed. 2006) (emphasis added), particularly not for the "carefully prescribed" one measured precisely "by numbers of days" established in section 706(e). *Mohasco*, 447 U.S. at 825. Likewise, while the two-year backpay rule provides some protection for employers in Title VII cases, there are no comparable backpay limit rules in other employment statutes that contain limitation periods like that in section 706(e). Further, the two-year backpay limit is no justification for allowing a liability award—that may include compensatory and punitive damages—on a claim that section

706(e) defines as stale. As this Court has recognized, section 706(g) is not an appropriate basis for relaxing the charge-filing requirement or expanding the scope of liability under Title VII. *See, e.g., Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 578-82 (1984); *Evans*, 431 U.S. at 558-59.

B. Ledbetter's Argument For Acquiescence In Allegedly Consistent Positions Of Most Courts Of Appeals And The EEOC Is Meritless.

Ledbetter next suggests (Pet. Br. at 29-33) that this Court should acquiesce in the positions of most courts of appeals and the EEOC, which she claims have consistently allowed plaintiffs to raise intentional pay discrimination claims based on alleged acts of discrimination taking place outside of the charge-filing period. This suggestion is meritless.

1. The courts of appeals simply have not consistently adopted the position that Ledbetter advocates. Rather, as she argued in her petition, "[t]he [c]ourts of [a]ppeals [a]re [i]ntractably [d]ivided [o]ver the [q]uestion [p]resented" in this case, and "the proper treatment of disparate pay claims under *Morgan* and *Bazemore* has generated considerable conflict and confusion in [the] circuits . . . ." Pet. at 9, 13.

First, some courts—like the court below—have held that an intentional pay discrimination claim is untimely if it merely challenges the present effects of acts taken outside of the charge-filing period. As Ledbetter admitted in her petition (Pet. at 13-14), *Dasgupta v. University of Wisconsin Board of Regents*, 121 F.3d 1138 (7th Cir. 1997), also held that a plaintiff's pay claim was untimely because "[t]here were no new violations during the limitations period, but merely a refusal to rectify the consequences of time-barred violations." *Id.* at 1140. "[A]n untimely Title VII suit," the court explained, "cannot be revived by pointing to effects within the limitations period of unlawful acts that occurred earlier." *Id.*

Second, while some courts have adopted Ledbetter's position, these courts have disagreed regarding how far back a plaintiff may reach in seeking damages. Some have held that backpay is limited to the disparity in salary during the limitations period. *See, e.g.*, *Forsyth v. Fed'n Employment & Guidance Serv.*, 409 F.3d 565, 573 (2d Cir. 2005). Others have held that plaintiffs can recover up to two years of backpay. *See, e.g.*, *Goodwin v. Gen. Motors Corp.*, 275 F.3d 1005, 1011 (10th Cir. 2002). And still others have allowed recovery to the date of the earliest discrimination. *See, e.g.*, *Gibbs v. Pierce County Law Enforcement Support Agency*, 785 F.2d 1396, 1398, 1400 (9th Cir. 1986).

Third, most of the courts adopting the position urged by Ledbetter have reasoned that intentional pay discrimination constitutes a "continuing violation," so that as long as the plaintiff receives one disparate paycheck during the limitations period, a charge with respect to related discriminatory acts outside the period is timely. *See, e.g.*, *Goodwin*, 275 F.3d at 1009; *Cardenas v. Massey*, 269 F.3d 251, 258 (3d Cir. 2001); *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 167-68 (8th Cir. 1995); *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 347 (4th Cir. 1994); *Bartelt v. Berlitz Sch. of Languages of Am., Inc.*, 698 F.2d 1003, 1004 (9th Cir. 1983); *Hall v. Ledex, Inc.*, 669 F.2d 397, 398 (6th Cir. 1982). As the court below correctly noted, however, *Morgan* rejected the "continuing violation" theory on which these cases are based.

In sum, there is simply no consistent position of the courts of appeals in which this Court can acquiesce.

2. Nor should this Court acquiesce in the EEOC's present view that an intentional pay discrimination claim is timely as long as the plaintiff received a single disparate paycheck within the limitations period. Ledbetter herself does not argue, nor could she, that the EEOC's view is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See*

Morgan, 536 U.S. at 110 n.6 ("[W]e have held that the EEOC's interpretive guidelines do not receive *Chevron* deference."). Nor is the EEOC's interpretation "entitled to respect" under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

The present version of the EEOC Compliance Manual, citing *Bazemore*, provides that "[r]epeated occurrences of the same discriminatory employment action, such as discriminatory paychecks, can be challenged as long as one discriminatory act occurred within the charge filing period." EEOC Compliance Manual § 2-IV.C. But, as noted above, *Bazemore* involved allegations of present intentional discrimination, and does not establish the timeliness of a claim based only on the effects of past discrimination.

Moreover, prior to 2001, the EEOC had justified its position on a different ground—by reference to "continuing violations" doctrine. Thus, the 2000 version of the EEOC Compliance Manual discussed the timeliness of intentional pay discrimination claims under the section entitled "Continuing Violations," and provided that, if "a charge raises a continuing violation, all of the events forming part of the continuing violation, including those that transpired outside the filing period, are considered timely, and relief may be obtained for all of the discriminatory events." EEOC Compliance Manual § 2-IV.C.2, at 5741 (July 27, 2000); *see also id.* at 5743. Similarly, prior to 2001, the EEOC reasoned in briefs and administrative decisions that such intentional pay discrimination claims were timely on a "continuing violation" theory. *See, e.g.*, Br. of the EEOC as Amicus Curiae, *Cardenas v. Massey* (3d Cir. 2001), 2000 WL 33988483, at *13 n.10; *Wintner v. Cisneros*, No. APL 01962705, 1996 WL 713995, at *1 (E.E.O.C. Dec. 5, 1996). The EEOC abandoned this view, and adopted its present view, only in the wake of *Morgan's* rejection of the "continuing violation" theory.

In short, the EEOC's present view rests on a misconstruction of *Bazemore*, and its prior view was rejected in *Morgan*. Considering the lack of "thoroughness," "validity," or "consistency" in the EEOC's pronouncements, its views are not entitled to any respect at all. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 142 (1976) (internal quotation marks omitted).

3. In all events, this Court has stressed that "no deference is due to . . . interpretations at odds with the plain language of [a] statute itself." *Pub. Employees Ret. Sys. v. Betts*, 492 U.S. 158, 171 (1989); *see also Mohasco*, 447 U.S. at 825. For that reason, this Court has not hesitated to reach conclusions that are contrary to the unanimous positions of the courts of appeals and the EEOC. *See, e.g.*, *Betts*, 492 U.S. at 175 (rejecting the position of the EEOC and all five courts of appeals that considered the question presented); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 346 n.28 (1977) (rejecting a position that "enjoyed wholesale adoption in the Courts of Appeals" and by the EEOC); *Gilbert*, 429 U.S. at 145-46 (rejecting the position of the EEOC and all six courts of appeals that addressed the question presented). The language of section 706(e) and this Court's cases interpreting it make clear that the Court should do so here as well.

C. Ledbetter's Inapt Analogies Concern Claims About Present Violations of Law.

Ledbetter also contends (Pet. Br. at 34-38, 42-46) that numerous "analogous contexts" demonstrate that her challenge to the present effects of alleged unlawful discrimination outside the charge-filing period should be considered timely. But the only relevant analogy that Ledbetter identifies—cases under the NLRA—in fact confirms that her claim is time-barred. Her remaining analogies are inapposite.

1. As Ledbetter correctly argues, the NLRA "served [as] a model for many of Title VII's enforcement

provisions." Pet. Br. at 36 (citing *Lorance*, 490 U.S. at 909). But, as *Lorance* held, this Court's principal NLRA limitations case, *Machinists*, confirms that the limitations period on an intentional discrimination claim begins to run with the adoption of a discriminatory policy, and not with each application of that policy. *See Lorance*, 490 U.S. at 911. Where a complaint based on events outside the limitations period is time-barred, permitting those events "to cloak with illegality" conduct within the limitations period that is "otherwise lawful" and did not independently violate the law "in effect results in reviving a legally defunct" claim, contrary to the limitations period set by Congress. *Machinists*, 362 U.S. at 417.

Moreover, *News Printing Co.*, 116 N.L.R.B. 210 (1956), which is cited in *Machinists*, 362 U.S. at 421 n.13, confirms that no different analysis applies in the context of a pay claim. In *News Printing Co.*, the complaint alleged that the employer had violated the NLRA by refusing to grant wage increases to employees because they had supported a union. 116 N.L.R.B. at 210. However, the only evidence presented "involved conduct occurring more than 6 months before the filing of the [relevant] charge[] . . . ." *Id.* at 211. The NLRB explained that, "[w]hile evidence . . . concerning conduct which occurred prior to the statutory 6-month period may be utilized as background evidence to evaluate a Respondent's subsequent conduct, it is well established that Section 10(b) of the Act precludes . . . giving independent and controlling weight to such evidence." *Id.* at 212 (footnote omitted).

The NLRA cases upon which Ledbetter relies are not to the contrary. Each case involved an *independent* violation of the NLRA within the limitations period. *See Gen. Motors Acceptance Corp. v. NLRB*, 476 F.2d 850, 853 (1st Cir. 1973) (finding a present violation of the NLRA based not on the employer's decision outside the limitations period to stop giving merit increases to its employees, but "upon a number of acts committed *within the limitations period* which . . . indicate that [the employer] was attempting to

discredit the union") (emphasis added); *Melville Confections, Inc. v. NLRB*, 327 F.2d 689, 691 (7th Cir. 1964) (explaining that maintenance of a facially discriminatory profit-sharing plan that excluded unionized employees from participation "carried with it its own inherent evidence of intent" to "discourage[] union membership" and constituted a complete violation of the NLRA without reference to conduct outside the limitations period) (internal quotation marks omitted); *NLRB v. F.H. McGraw & Co.*, 206 F.2d 635, 639 (6th Cir. 1953) (noting, before *Machinists* was decided, that the enforcement of a closed shop agreement, which on its face violates the NLRA, constitutes independently actionable conduct without reference to the circumstances of the adoption of the agreement outside the limitations period); *Farmingdale Iron Works, Inc.*, 249 N.L.R.B. 98, 99 (1980) (concluding that each failure to make contractually required benefit fund payments within the limitations period constituted an independent, "separate and distinct" violation of the NLRA without the need to examine conduct outside the limitations period).

2. Ledbetter's other analogies are also flawed: In each instance, the alleged unlawful act—as defined in each pertinent area of law—occurs during the limitations period.

For example, under the Equal Pay Act, "[a] violation occurs when an employer pays lower wages to an employee of one gender than to substantially equivalent employees of the opposite gender in similar circumstances"—without the "need [to] prove that the pay disparity was motivated by . . . discriminat[ion] . . . ." *Pollis v. New Sch. for Social Research*, 132 F.3d 115, 118 (2d Cir. 1997) (discussing 29 U.S.C. § 206(d)). Thus, the mere payment of a disparate wage constitutes an independent violation and starts a new limitations period each time that it occurs.

So, too, under the Fair Labor Standards Act, "the source of [an employee's] recovery is the failure to pay [the employee] overtime, not the [employer's] rationale for not

paying" overtime. *Knight v. City of Columbus*, 19 F.3d 579, 582 (11th Cir. 1994). Liability for a failure to pay overtime within the limitations period does not depend on the original "decision to classify overtime-eligible employees as exempt," which may have occurred outside the limitations period. *Id.* Thus, "[e]ach failure to pay overtime constitutes a new" and complete "violation." *Id.* at 581 (emphasis omitted).

Contract law governing other sorts of installment obligations is to the same effect. "[A] cause of action in contract accrues at the time of the breach or failure to do the thing that is the subject of the agreement." 31 Richard A. Lord, *Williston on Contracts* § 79:14, at 316 (4th ed. 1990) (internal citations omitted). If, under the contract, "money is payable in installments," each installment constitutes a separate obligation, and each failure to pay constitutes a separately actionable breach with its own limitations period. *Id.* at 338. The same rule governs each separately actionable failure of an employer "to make each withdrawal liability payment when due" under the Multiemployer Pension Plan Amendments Act, 29 U.S.C. § 1381(a). *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 208 (1997).

Similarly, in antitrust law, each "unlawfully high priced sale[]" constitutes a new violation because that sale from a continuing restraint of trade is the "separate," single act that violates the Sherman Act. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997). Accordingly, a plaintiff may recover for present violations regardless of the plaintiff's knowledge of other earlier violations that were not timely challenged (though "the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period"). *Id.*

Finally, Ledbetter's reliance on myriad other criminal and civil rights analogies is likewise inapposite. In some of the

cases that Ledbetter cites, the affirmative defense of the statute of limitations was not even in issue. *See, e.g., Hunter v. Underwood*, 471 U.S. 222 (1985); *City of Los Angeles v. Manhart*, 435 U.S. 702 (1978). Others involved allegedly discriminatory policies that were reenacted during "each year[]" of the limitations period, and that, in any event, were challenged by some plaintiffs within the limitations period of the original enactment. *Palmer v. Bd. of Educ. of Cmty. Unit Sch. Dist. 201-U*, 46 F.3d 682, 685, 686 (7th Cir. 1995); *see also Manhart*, 435 U.S. at 715 (policy at issue discriminated "[o]n its face"). Still others quite properly apply the rule that, in appropriate circumstances, evidence of conduct outside the limitations period may be used in conjunction with other evidence to establish a *present* violation. *See, e.g., United States v. Carlson*, 235 F.3d 466, 470 (9th Cir. 2000); *United States v. Ashdown*, 509 F.2d 793, 798 (5th Cir. 1975). But such "prior" conduct can serve as no more than "background evidence in support of a *timely* claim." *Morgan*, 536 U.S. at 113 (emphasis added).

D. Ledbetter's Reliance On The Legislative History Of Statutory Provisions Other Than Section 706(e) Is Without Merit.

Ledbetter also argues that the legislative history of the failed Civil Rights Act of 1990 and of the enacted Civil Rights Act of 1991 supports the limitations rule that she advocates. Ledbetter is wrong again.

Neither the failed 1990 legislative effort nor the 1991 statute amended the pertinent statutory language in section 706(e), which was first enacted in 1964. This Court has cautioned repeatedly that "[t]he views of members of a later Congress, concerning [a] different section[] of Title VII" than the one at issue, "are entitled to little if any weight." *Teamsters*, 431 U.S. at 354 n.39; *see also, e.g., Betts*, 492 U.S. at 168 (noting that, where a subsequent amendment to a statute did not modify the language of the provision at issue, "the interpretation given by one Congress (or a committee or

Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute"); *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 200 n.7 (1977) (explaining that "[l]egislative observations 10 years after passage of [a statute] are in no sense" relevant). Indeed, the legislative history of "failed legislative proposals" like the Civil Rights Act of 1990 is "a particularly dangerous ground on which to rest an interpretation of a prior statute." *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 169-70 (2001) (internal citation and brackets omitted).

In any event, neither piece of legislative history supports Ledbetter's position. The Senate Report for the Civil Rights Act of 1990 merely approved "the result correctly reached in *Bazemore*." *Civil Rights Act of 1990—Report from the Senate Labor and Human Resources Committee*, S. Rep. No. 101-315, at 54 (1990). As described above, the result reached in *Bazemore*—to wit, that an employer cannot justify post-Act discrimination by showing that the discrimination began prior to the statute's effective date—is not at issue in this case. Moreover, the interpretive memorandum of the sponsors of the Civil Rights Act of 1991 emphasized that "[t]his legislation should not be interpreted to affect the sound ruling[] of the Supreme Court" in *Ricks*. 137 Cong. Rec. S15472-01, S15485 (daily ed. Oct. 30, 1991). That decision—in which this Court reaffirmed that "[i]t is simply insufficient" for a plaintiff raising an intentional discrimination claim to challenge the "'present effect[s] [of a] past illegal act'" that was not made the basis for a timely charge, *Ricks*, 449 U.S. at 258 (internal citation omitted)—demonstrates that, contrary to Ledbetter's contention, the intentional pay discrimination claim at issue in this case is time-barred.

CONCLUSION

For the reasons set forth above, the judgment of the court below should be affirmed.

Respectfully submitted,

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No. 05-1074

IN THE

Supreme Court of the United States

LILLY M. LEDBETTER,

Petitioner,

v.

GOODYEAR TIRE AND RUBBER COMPANY, INC.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Neither respondent nor the Solicitor General defends the rule that was the basis of the decision below. Instead, both ask this Court to affirm on the alternate ground that paying a worker less than similarly situated coworkers for the past week's work because of her sex does not constitute a present violation of Title VII. The Court should reject this invitation.

Respondent does not contest that its interpretation is inconsistent with the rule applied in the vast majority of the circuits during the more than 40 years since Title VII was enacted, that the courts uniformly permitted claims like petitioner's at the time Congress amended Title VII's limitations provision in 1991, or that its position conflicts with the long-standing rule applied by the EEOC in processing charges of discrimination. It further concedes that the paycheck accrual rule applied by the courts and the EEOC follows the common law and statutory tradition of treating each pay period as a separate transaction, giving rise to a new pay-related claim with its own limitations period.

Respondent nonetheless contends that Congress would not have intended the traditional paycheck accrual rule to apply because it exposes employers to prejudice from undue delay in challenging pay decisions. Yet Goodyear admits that the doctrine of laches independently precludes suits in which an employer is actually prejudiced by undue delay. Thus, the principal difference between the rule presently applied by the courts and the rule proposed by respondent is that under Goodyear's rule, meritorious claims will be dismissed whenever an employee, through no fault of her own, fails to discover the disparity in her pay or grounds for believing that the disparity is discriminatory, within 180 or 300 days of the pay-setting decision, even when the delay imposes no prejudice upon the employer. That rule risks imposing great harm – giving the victim of discrimination a choice between quitting her job or a career of perpetual second-class

treatment because of her sex – for no correspondingly good reason.

There is no evidence Congress intended to provide such unnecessary protection at such a high cost to the enforcement of this important statute. Indeed, respondent acknowledges that the risk of stale claims did not prevent Congress from authorizing suits challenging pay decisions outside the limitations period under the parallel provisions of the Equal Pay Act (EPA), when a Title VII suit is brought by the Attorney General or the EEOC, or when a private plaintiff alleges that the disparity is a result of a written or unwritten "policy" of discrimination.

This Court should reject respondent's anomalous construction in favor of the one adopted by the Court in *Bazemore* v. *Friday*, 478 U.S. 385 (1986), embraced by the agency tasked by Congress to administer the timely filing requirement, and consistently applied by the courts of appeals for decades without incident: each paycheck that offers a woman less pay than a man because of her sex constitutes a new violation of Title VII that can be challenged within the limitations period of Section 706(e).

I. This Case Is Controlled By *Bazemore* Not *Evans*.

A. Respondent's Reliance On The *Evans* Line Of Cases Is Misplaced.

The parties agree that petitioner may challenge any "unlawful employment practice" that occurred within 180 days of her EEOC charge, even if she failed to challenge prior instances of that practice. See *Nat'l Railroad Passengers Corp.* v. *Morgan*, 536 U.S. 101, 113 (2002). All agree, moreover, that under *United Airlines, Inc.* v. *Evans*, 431 U.S. 553 (1977), and its progeny, the unlawful employment practice itself must occur during the limitations period. See *Lorance* v. *AT&T Technologies, Inc.*, 490 U.S. 900 (1989); *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980).

The question is whether payment of an intentionally

disparate wage constitutes a present violation of Title VII – in which case the *Evans* line of cases has no relevance, see *Bazemore*, 478 U.S. at 396 n.6 – or whether Title VII only prohibits the making of discriminatory pay decisions – in which case, the disparate paycheck might be seen as simply a continuing consequence of a prior unlawful act under *Evans*. But nothing in *Evans* itself, or any of its progeny, resolves that question, for none involved an ordinary disparate pay claim like petitioner's. In *Evans*, the plaintiff acknowledged that she was paid the same as other similarly situated workers, under a pay system that was neutral on its face and in application. 431 U.S. at 557-58. Evans claimed that she would be *differently* situated in terms of seniority had she not been unlawfully terminated years before. But that claim, the Court held, was an untimely challenge to the prior termination, not a claim of present pay discrimination. *Ibid.*

Petitioner, on the other hand, brings an ordinary disparate pay claim. She asserts that she was paid less because Goodyear decided to pay her less because of her sex, not because she had less seniority as a result of some other kind of unlawful employment action that happened in the past. And because sex was directly taken into account in making the pay decision, Goodyear's pay system – unlike United Airlines's system in *Evans* – was not "neutral in its operation," 431 U.S. at 558, but rather "treat[ed] similarly situated employees differently." *Lorance*, 490 U.S. at 912.

The question then is whether that kind of discrimination violates Title VII only when the pay decision is made or every time it is implemented. While the Court had no occasion to decide that question in *Evans*, the issue was squarely presented and resolved in *Bazemore*.

B. *Bazemore* Applies To This Case.

Although *Bazemore* did not interpret Title VII's limitations provision, it necessarily decided the central question presented here: in a disparate pay case, "[w]hat constitutes an 'unlawful employment practice' and when has

that practice 'occurred'?" *Morgan*, 536 U.S. at 110. If, as respondent argues, Title VII prohibits only the making of discriminatory pay decisions, but not the payment of discriminatory wages, the Fourth Circuit would have been correct in deciding that the present disparity in the *Bazemore* plaintiffs' pay simply gave "present effect to a past act of discrimination" that was legal when it occurred. *Bazemore* v. *Friday*, 751 F.2d 662, 670 (CA4 1984) (quoting *Evans*, 431 U.S. at 558). But this Court rejected that view, concluding that the present execution of a past discriminatory pay decision was itself a present and independent violation of Title VII. Specifically identifying both the exact violation and when it occurs, the Court held that "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." 478 U.S. at 395-96.

Respondent's and the Solicitor General's attempts to distinguish *Bazemore* fail.

1. Respondent asserts (Br. 25-31) that the Court's explanation of its holding and rationale in *Bazemore* was incomplete, and that the Court really relied on an additional fact never explicitly mentioned in the opinion itself: that the Extension Service made a conscious decision, at some point after the effective date of the Act, to maintain the prior disparate pay levels for the purpose of discriminating against its black employees. No court has ever adopted this view of *Bazemore*, and for good reason.

First, the opinion in *Bazemore* says hardly a word about the Extension Service's reasons for allowing its prior discriminatory pay levels to carry forward after the effective date of Title VII, other than to observe that the disparities "linger[ed] on" after 1965 and past 1972, and that the Service "made some adjustments to try to get rid of the salary disparity resulting on account of pre-Act discrimination." *Bazemore*, 478 U.S. at 394-95 (quotation marks omitted).

This is hardly a finding of a present intent to maintain the disparities for discriminatory purposes.

Second, the employer's reasons for not eradicating the prior disparity were irrelevant to the legal theory advanced by the petitioners and accepted by this Court. The employees' "claim on appeal [was] that 'the pre-Act discriminatory difference in salaries should have been affirmatively eliminated but has not.'" *Id.* at 395 (citation omitted). In accepting this argument, the Court explained that its "holding * * * focuses on the present salary structure, which is illegal *if it is a mere continuation* of the pre-1965 discriminatory pay structure." *Id.* at 396 n.6 (emphasis added). The Court did not say that the present salary structure was illegal if "maintain[ed] * * * for a discriminatory purpose," Resp. Br. 30; "mere continuation" was sufficient. Thus, the Court explained, without qualification, that "[i]f the acknowledged pre-1965 disparities continued for employees employed prior to 1965, then respondents violated the law." *Bazemore*, 478 U.S. at 397 n.8.

Third, respondent's interpretation leads to the untenable conclusion that the Extension Service would have been allowed to continue to pay black employees less than whites for the same work, so long as it decided to maintain its prior pay structure for a non-discriminatory reason (say, because it lacked the funds to equalize black and white workers' salaries without impairing its programs).

Respondent nonetheless insists that the Court *must* have relied on some new post-Act discriminatory decision because the Court characterized the petitioners' pay claims as involving a "present violation." Br. 27 (quoting *Bazemore*, 478 U.S. at 396 n.6). In Goodyear's view, the implementation of a discriminatory pay decision can never, in itself, be intentionally discriminatory because a payroll system "mechanically implements the salary determinations made" by the employer at a prior time. Br. 21. Respondent simply misconstrues the Court's conception of a present

intentionally discriminatory act. *Bazemore* recognized that the execution of a discriminatory decision necessarily constitutes a present act of intentional discrimination. The essence of "discrimination" is "differential treatment." *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (citation omitted). Intentional discrimination thus occurs when the differential treatment takes place, even if the intent to engage in that conduct for a discriminatory purpose was made previously. That is why, for example, a student excluded from a school because of his race may challenge the discriminatory treatment as long as it continues, even though the exclusion on any given day is simply the result of the mechanical implementation of the school board's prior discriminatory decision. *Palmer* v. *Bd. of Educ.*, 46 F.3d 682, 683 (CA7 1995). And it is why respondent is correct (albeit for the wrong reasons) in saying that the "claim of present, continuing, intentional discrimination was the key to *Bazemore*." Br. 28.[1]

2. The Solicitor General is willing to accept that under *Bazemore* each paycheck that offers a woman less money than a man for the same work because of her sex constitutes a present act of intentional discrimination in violation of Title VII, but only when the discrimination is undertaken pursuant to a "facially discriminatory policy," Br. 13, or an "unwritten intentionally discriminatory pay structure," *id.* at 14 (which apparently is the same thing as an "unwritten policy," *id.* at 15). He acknowledges that "an ongoing policy of

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[1] Respondent's other attempts to distinguish *Bazemore* also fail. Respondent notes (Br. 27-28) that the plaintiffs in *Bazemore* could not have challenged their discriminatory pay before 1972, but nothing in Title VII or this Court's decision established a special timely filing requirement or accrual rule for claims relating to pay decisions made before the effective date of the Act. Nor did *Bazemore* craft a rule applicable only to suits brought by the United States, as the Court's decision applied to the private plaintiffs' Title VII claims in that case as well. See 478 U.S. at 391.

intentionally paying women less than men because of their sex 'by definition discriminates each time it is applied.'" Br. 15 (quoting *Lorance*, 490 U.S. at 912 n.5). But he nonetheless insists that persistently paying an *individual* woman less than men because of her sex in accordance with a discriminatory pay decision does not constitute a present violation of Title VII, even though it too treats that woman differently than similarly situated workers because of her sex every time a paycheck is issued. This assertion is unfounded.

Bazemore made no distinction between individualized and policy-based discrimination. It is true that *some* of the *Bazemore* plaintiffs' claims arose from the "institutionally segregated base salaries created by the facially discriminatory, pre-1965 salary practices." Resp. Br. 25. But those hired after 1965 were given equal starting salaries. 751 F.2d at 671. The disparity in their pay, like petitioner's, arose solely "as a result of a series of discrete intentionally discriminatory pay raise decisions." SG Br. 16; see 478 U.S. at 397 n.8 (noting these "two distinct types of salary claims"). There was no allegation that those individual pay raise decisions were made pursuant to some "unwritten policy" of discrimination. SG Br. 15.[2] Yet the Court made no distinction between the pre- and post-1965 hires, but rather made clear that the Extension Service was liable for any "salary disparities based on race that began prior to the effective date of Title VII," 478 U.S. at 397, even if those "disparities were created or begun *after* the merger [and] continued past 1972," *id.* at 397 n.8 (emphasis in original).

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[2] To the contrary, there was "no uniform procedure for pay increases," 751 F.2d at 666, which were made by each individual county board, 478 U.S. at 389, and in reliance on performance rankings made by one of twelve different District Extension Chairmen, 751 F.2d at 665, 671. Indeed, this Court affirmed the denial of certification for a class of county defendants precisely because there was no proof of "either a statewide rule or practice." 478 U.S. at 406.

To be sure, there were more victims of discrimination in *Bazemore* than in this case, but the Court gave no indication that this had any bearing on its decision, or that its references to "structures" and "patterns" referred to the systematic discrimination against many, as opposed to the recurring discrimination against an individual. To the contrary, the only "pattern" of significance to the Court's decision was the recurring nature of the discriminatory paychecks. Accordingly, when the Court stated its basic holding, it spoke in terms of discrimination against an individual: "Each week's paycheck that delivers less to *a* black than to *a* similarly situated white is a wrong actionable under Title VII, regardless of the fact that *this* pattern was begun prior to the effective date of Title VII." 478 U.S. at 395 (emphasis added).

Indeed, the Solicitor General cannot seriously maintain that *Bazemore* construed Title VII to permit intentionally discriminatory pay disparities to persist after the effective date of the statute, so long as the employer only discriminated against some, but not all, of its black workers prior to 1972. Yet under the Solicitor General's interpretation, if a public employer hired a single minority to its workforce in 1971 and conceded that it kept her salary twenty percent lower than her colleagues' because of her race, the employer could have maintained that pay disparity in perpetuity because the discrimination was "discrete" and not the result of an "ongoing intentionally discriminatory pay policy." Br. 16.[3]

Nor does anything in *Lorance* support the Solicitor General's distinction. There, the Court distinguished between two different kinds of seniority policies, not between general policies and discrimination with respect to an individual. 490 U.S. at 911-12. It held that a seniority plan that is

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[3] If the Solicitor General believes that this example illustrates the operation of a discriminatory "pay structure" or "unwritten policy," it is difficult to see why petitioner's case does not fall within his proposed rule.

"nondiscriminatory in form and application" yet adopted for a discriminatory purpose violates Title VII upon its adoption, but that a facially discriminatory policy "can be challenged at any time" because "by definition [it] discriminates each time it is applied." *Id.* at 912 & n.5. Crucially, the Court explained that a facially discriminatory policy discriminates each time it is applied not because the discrimination is self-evident or because it is policy-based, but rather because it "treats similarly situated employees differently." *Id.* at 912. The same is true of a discriminatory pay decision: every time it is implemented, it treats similarly situated workers differently by offering the victim less money for the same work performed by others during the same pay period. Which is why, the Court explained in *Lorance*, the rule adopted in that case was consistent with the holding of *Bazemore*. *Id.* at 912 n.5.

Nor is there any basis in the text of Title VII to hold that a disparate pay violation occurs at the time of the pay decision if the employer discriminates against only one employee, but occurs at the time the paycheck is delivered if the discrimination is more widespread. When Congress intended to distinguish between individual and pattern-or-practice claims in Title VII, it did so explicitly. See 42 U.S.C. 2000e-6(a) (authorizing the Attorney General to bring "pattern-or-practice" but not individual claims). But in defining unlawful employment practices and in establishing the charge-filing deadlines, Congress made no such distinction. 42 U.S.C. 2000e-2, 2000e-5(e).

In addition, applying different accrual rules depending on whether the employer has engaged in individual or policy-based violations would lead to substantial administrative problems. In order for an employee to know when her EEOC charge is due, she would have to determine not only whether she was being paid less than others (and whether that disparity was likely to be a result of sex discrimination) but also whether other women were also being paid disparate wages (and, if so, whether those disparities were because of

sex). She would then have to determine whether the discrimination was sufficiently widespread to be considered the result of an "unwritten policy." That question would not be simple to determine as a matter of fact (multiple regression analysis was required to establish the pattern in *Bazemore*) or as a matter of law. For example, is there an "unwritten policy" when an employer discriminates against the sole woman in a particular position? Is the fair treatment of five women out of a hundred sufficient to rebut the assertion of an "unwritten policy"? If not, what is the threshold? The EEOC would then have to make the same determinations – essentially requiring a full-scale investigation – just to decide the threshold question of whether the charge was timely filed.

II. Respondent's Objections To The Traditional Paycheck Accrual Rule Are Unfounded.

A. There Are Substantial Differences Between Pay And Promotion Decisions.

Respondent and the Solicitor General argue that construing pay discrimination as a recurring violation is inconsistent with Title VII's treatment of other unlawful employment practices, especially promotions, which occur at the time a discriminatory decision is made. This assertion is somewhat odd, given their acknowledgment that a paycheck accrual rule applies to at least *some* disparate pay claims (*e.g.*, those involving an unwritten policy). In any case, there are substantial historical and practical distinctions between pay and promotion decisions that plainly led Congress to treat the two practices differently under Title VII.

1. As described in our opening brief (Br. 34-36), the law has long treated pay-related aspects of an employment relationship as a series of distinct, recurring transactions that give rise to recurring claims and limitations periods. The employment contract is treated as if it were periodically renewed, presenting a distinct question whether the employee

received the wages she was due for that period's work under her contract and applicable statutory law. *Ibid.*

Respondent (Br. 45) and the Solicitor General (Br. 26-27) acknowledge that Congress adopted that basic background principle under the Equal Pay Act, which gives rise to recurring violations with each payment of an unlawfully disparate wage. That Congress chose the traditional paycheck accrual rule for EPA claims is strong evidence that it intended for the same rule to apply under Title VII as well. The EPA was passed by the same Congress that enacted Title VII, and imposes the same basic prohibition in pay discrimination cases under Title VII. See generally *County of Washington* v. *Gunther*, 452 U.S. 161, 171-75 (1981). Indeed, responding to concerns about possible inconsistencies between the two statutes, Senator Clark, the principal spokesman for Title VII in the Senate, stated that "[t]he standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under title VII." *Id.* at 172 n.12 (citation omitted). Lest the courts nonetheless construe the statutes differently, Congress adopted the "Bennett Amendment" to Title VII, extending the affirmative defenses of the EPA to claims of sex-based pay discrimination under Title VII. *Id.* at 167; 42 U.S.C. 2000e-2(h).

Respondent implies there is a relevant difference between the EPA and Title VII because the EPA "focuses on the question of equal pay for 'equal work,' rather than on stale questions of intent in past decisions in years gone by." Br. 39 (citation omitted). This is misleading. It is true that Title VII requires a finding of discriminatory intent, while the EPA imposes liability if the employer is unable to show that a wage disparity is the result of "any other factor other than sex." 29 U.S.C. 206(d)(1). But in the vast majority of cases, this distinction makes no difference at all – the employer's failure to establish an EPA defense leads to the nearly inescapable inference of intentional discrimination. More to the point, the distinction makes no practical difference that

could be relevant to an accrual rule. Although intent is not an EPA element, juries must still consider the basis of past pay decisions in order to determine whether the employer has shown that the pay disparity is the result of the nondiscriminatory application of a merit system or "any other factor other than sex." 29 U.S.C. 206(d)(1). See, *e.g.*, *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 191, 204-05 (1974) (examining basis of pay policy enacted more than 25 years earlier); *Kovacevich* v. *Kent State Univ.*, 224 F.3d 806, 827-28 (CA6 2000) (examining individual pay raise decisions over fifteen-year period).

Both statutes thus pose an equal risk of stale claims arising from "past decisions in years gone by." Respondent acknowledges that Congress did not respond to this risk by rejecting the traditional paycheck accrual rule for EPA claims. There is no reason to think Congress viewed the problem differently a year later when it enacted Title VII.

2. In addition to historical practice, there are sound theoretical and practical reasons for treating pay and promotion decisions differently.

First, although a promotion denial deprives an employee of an opportunity to take on added responsibilities for additional pay, it does not leave the worker in a position of continually being paid less because of her sex for the work she actually does perform. Her pay remains commensurate with her duties and equal to that paid to similarly situated coworkers doing the same job. A discriminatory pay decision, on the other hand, results in the recurring unequal treatment of similarly situated workers performing the same duties every time a disparate paycheck is issued.

Second, an employer is not necessarily enriched as a result of promotion discrimination – it must still pay the higher wage to whomever it promoted. But an employer obtains a new financial benefit each time it executes a discriminatory pay decision by issuing a disparate paycheck.

Third, promotion decisions necessarily implicate the interests of innocent third parties in a way that pay decisions do not. Remedying the unlawful denial of a promotion often requires revoking the promotion already given to another, or effectively eliminating the next promotion opportunity for all other workers if the position is reserved for the victim. There is, therefore, a special need for quick resolution of a claim that may disrupt the legitimate and settled expectations of other employees. Disparate pay, on the other hand, can be remedied at any time solely at the expense of the lawbreaking employer.

Fourth, and most importantly, there are real practical differences between promotions and pay that are of central relevance to the accrual rule. Practices such as discriminatory "termination, failure to promote, denial of transfer, or refusal to hire are easy to identify," *Morgan*, 536 U.S. at 114, because the victim always knows that they have happened and can discover whether she has been treated differently than other similarly situated workers with relative ease. In contrast, because employers frequently keep individual salary levels secret, an employee often does not know whether a particular pay decision has given rise to disparate treatment at all, particularly when the disparity arises from decisions about her colleague's pay rather than her own. See Pet. Br. 26.

Moreover, even when an employee is aware of some level of disparity, that fact alone is not enough to warrant the immediate filing of an EEOC charge. Because employers rarely make the discriminatory basis of their pay decisions known, the principal evidence of discriminatory intent often is a pattern of disparate pay decisions whose allegedly neutral explanations appear increasingly less plausible over time. And while other evidence of discriminatory intent *may* arise during the limitations period (SG Br. 23), often it does not, but comes to light over an extended period of time, as happened in this case.

The Solicitor General and respondent suggest that employees may often, and that petitioner did,[4] have a reasonable basis for bringing charges before the charges are actually filed. But neither suggests that this Court should adopt a discovery rule for Title VII. Instead, both argue that claims based on pay decisions outside the limitations period should be barred whether the employee had a basis for a charge during that time period or not, and whether she waited nineteen years or one day beyond the limitations period. Under this rule, many employees will be subject to perpetual unremedied pay discrimination through no legitimate fault of their own.[5]

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[4] Respondent asserts that petitioner "testified" that she was aware of the disparity in her pay as early as 1992. Br. 37. Although Goodyear gives the impression that it is relying on record evidence admitted at trial, it instead cites solely to petitioner's inadmissible deposition testimony. *Ibid.* When petitioner testified at trial, Goodyear never explored with her when she may have developed a basis for suspecting illegal pay discrimination, undoubtedly because respondent had advanced no laches defense. For the same reason, petitioner was never given an opportunity to address any assertion that her delay in filing a charge was undue or prejudicial.

[5] For example, of the 40 cases listed in a recent survey of disparate pay cases and decided between 1996 and 2006, see *Wage Differentials as Violative of Those Provisions of Title VII of the Civil Rights Act of 1964*, 62 A.L.R. Fed. 33 (2006), petitioner is able to identify only two in which the entire alleged pay disparity would have been timely challenged under respondent's accrual rule. App. A (listing cases). In nineteen, a challenge to all or substantially all of the alleged disparity would be precluded (most often because the present disparity is largely a result of decisions made about starting salaries outside the statutory period). App. B. In one case, the claim would have been precluded under either party's rule. App. C, and the rest of the cases lacked sufficient detail to allow application of the rules. App. D.

Respondent's attempts to suggest otherwise (Br. 37-39) are meritless. The Court has instructed that estoppel and equitable tolling "are to be applied sparingly." *Morgan*, 536 U.S. at 113. Indeed, equitable estoppel only "comes into play if the defendant takes active steps to prevent the plaintiff from suing in time, as by promising not to plead the statute of limitations." *Cada* v. *Baxter Healthcare Corp.*, 920 F.2d 446, 450-51 (CA7 1990). Similarly, "[e]quitable tolling is only appropriate in rare and exceptional circumstances in which a party is prevented in some extraordinary way from exercising his or her rights * * * ." 54 C.J.S. LIMITATIONS OF ACTIONS §115 (2006). And while the EEOC is not subject to a statute of limitations, *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 366 (1977), it can only act in response to a timely charge filed by the employee. See 42 U.S.C. 2000e-5(f)(1). The Attorney General has no jurisdiction over private employers at all, and may sue public employers on behalf of individuals only upon referral of a timely charge from the EEOC. *Ibid.* Finally, the Equal Pay Act does not apply to discrimination based on race, color, religion, or national origin. 29 U.S.C. 206(d)(1). And even in the context of sex discrimination, an EPA claim is unavailable when the plaintiff can identify no comparator in her establishment performing the same work. See *ibid.*

B. The Traditional Rule Adequately Protects Against Stale Claims.

The traditional paycheck accrual rule accommodates the need for continuing access to a remedy for continuing pay discrimination, while eliminating the need for a discovery rule and balancing employers' legitimate interests in avoiding unfair prejudice from unwarranted delay.

Goodyear acknowledges that the doctrine of laches independently precludes suits in which an employer is actually prejudiced by undue delay. It nonetheless asserts that laches does "not adequately protect employers' interests in avoiding stale claims," but then never says why that is, other

than to observe the truism that "laches is not a substitute for a statute of limitations." Br. 39 (emphasis and citation omitted). Petitioner does not claim otherwise; her point is simply that there is no need for a narrow construction of the statute of limitations in order to avoid stale claims that would be eliminated by laches. In fact, although the paycheck accrual rule has been in place in the circuits for more than twenty years, respondent is unable to show that it has, in fact, substantially burdened employers with stale pay claims.

Respondent's and the Solicitor General's arguments regarding stale claims and employer prejudice ring particularly hollow in light of their concessions that the paycheck accrual rule – with all its assertedly unacceptable consequences – applies to claims brought under the Equal Pay Act and to Title VII suits challenging pay disparities arising from written and unwritten employer policies. Juries also must consider long-past incidents in Title VII hostile work environment cases, see *Morgan*, 536 U.S. at 115-22, or whenever an employer attempts to justify a promotion or other decision on the basis of an employee's prior performance record, see, *e.g.*, *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 233-37 (1989). It is thus simply not the case that Congress generally intended to protect employers from having to justify decisions made more than 180 or 300 days before an EEOC charge was filed.

III. The EEOC's Interpretation Is Entitled To *Chevron* Deference.

If there were any ambiguity over the application of Title VII's filing requirement to disparate pay claims, the Court should resolve it by deferring to the expert views of the agency Congress directed to receive, investigate, and, in some cases, adjudicate charges of discrimination under the statute.

Contrary to respondent's assertion (Br. 41), petitioner does indeed argue that the EEOC's position is entitled to *Chevron*-style deference under this Court's decisions in *United States* v. *Mead Corp.*, 533 U.S. 218 (2001), and *EEOC*

v. *Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988). See Pet. Br. 34. Although it did not delegate to the EEOC authority to issue substantive regulations, see *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 141 (1976), Congress did authorize the EEOC to issue procedural regulations governing the filing and investigation of EEOC charges, see *id.* at 141 n.20 (citing 42 U.S.C. 2000e-12(a)); see also 29 C.F.R. Pt. 1601 (procedural regulations).[6]

Accordingly, in *Commercial Office Products*, 486 U.S. 107, this Court gave *Chevron*-style deference to the EEOC's interpretation of Section 706 – the provision at issue in this case – holding that it was

> axiomatic that the EEOC's interpretation of Title VII, for which it has primary enforcement responsibility, need not be the best one by grammatical or any other standards. Rather, the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference.

Id. at 115.

It is true that the EEOC's position in *Commercial Office Products* was expressed through a regulation, but "deference under *Chevron* * * * does not necessarily require an agency's exercise of express notice-and-comment rulemaking power." *Edelman* v. *Lynchburg College*, 535 U.S. 106, 114 (2002). While this Court has held that an interpretation embodied in the EEOC's Compliance Manual is insufficient to establish the agency's authoritative position for *Chevron* purposes,[7] the EEOC has expressed the same view of the statute through

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[6] Even absent this express authorization, the delegation of interpretative authority over timeliness questions would be implicit in the requirement that the EEOC accept, process, and investigate timely charges. See *Mead*, 533 U.S. at 229.

[7] See *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000); but see *id.* at 591 (Scalia, J., concurring in part and in judgment).

formal adjudications of federal sector complaints.[8] See Pet. Br. 32-33 & n.18; *Mead Corp.*, 533 U.S. at 230-231 & n.12 (formal adjudications qualify for *Chevron* deference). The Commission's amicus briefs and the Manual remove any doubt about the Commission's authoritative interpretation of the statute. See Pet. Br. 32; cf. *Auer* v. *Robbins*, 519 U.S. 452, 461-62 (1997).

Neither respondent nor the Solicitor General attempts to explain why *Chevron* deference is unavailable for interpretations set forth in the EEOC's formal adjudications. Instead, respondent argues the position expressed in the Compliance Manual should not be given *Skidmore* deference because "prior to 2001, the EEOC had justified its position on a different ground – by reference to 'continuing violations'

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[8] When Congress extended Title VII's protections to federal employees in 1972, it delegated to the EEOC authority to implement the extension through procedural and substantive regulations. 42 U.S.C. 2000e-16(b). Pursuant to that authority, the EEOC promulgated regulations adopting Title VII's definition of "discrimination," 29 C.F.R. 1614.102(b), and establishing a process for filing and resolving complaints. See 29 C.F.R. Pt. 1614. Under that process, the employee must file a timely allegation of discrimination. See 29 C.F.R. 1614.105(a)(1) ("An aggrieved person must initiate contact with [an Equal Employment Opportunity] Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action."); 29 C.F.R. 1614.107(a)(2) (untimely complaint must be dismissed). The regulations provide a number of avenues for resolving complaints formally and informally, generally culminating in a right to a hearing before an administrative law judge. 29 C.F.R. 1614.109, subject to eventual review by the Commission itself. *Id.* at § 1614.401. The Commission is required to dismiss appeals raising untimely charges, *id.* at § 1614.405(a), and is therefore required to determine when, exactly, the relevant unlawful employment practice occurred – precisely the same question at issue in this case under the parallel requirement of Section 706(e).

doctrine." Br. 42. That is no basis for denying *Chevron* deference to the separate formal adjudications; when applicable, *Chevron* deference is due even if the agency has changed not only its rationale, but also its interpretation. See, *e.g.*, *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 125 S. Ct. 2688, 2710 (2005).

Nor is it ground for denying *Skidmore* deference in any event. While the EEOC did refer to pay discrimination as a "continuing violation" in the past, the choice of that label was not substantively inconsistent with this Court's decision in *Morgan*, which recognized that recurring violations (whether labeled "continuing" or something else) can be challenged at any time so long as they are repeated during the limitations period. 536 U.S. at 113. More importantly, regardless of the precise manner in which the Commission related its interpretation to the extant case law over the years, there can be no reasonable dispute that the agency has consistently found that allowing employees to challenge ongoing intentionally discriminatory pay disparities is necessary in light of the language and purposes of Title VII.

"[D]eference is particularly appropriate on this type of technical issue of agency procedure." *Commercial Office Prods.*, 486 U.S. at 125 (O'Connor, J., concurring). Having reviewed tens of thousands of discrimination complaints over many decades, the Commission is particularly well-situated to evaluate the practical consequences of the proposed accrual rules (*e.g.*, whether a paycheck accrual rule leads to many stale claims to the prejudice of employers, and whether a decision accrual rule would pervasively exclude meritorious challenges to ongoing discrimination) in light of the core congressional purposes animating the timely filing rule.

IV. Petitioner's Claim Was Timely.

Petitioner's claim thus was timely for two related reasons. First, petitioner received intentionally discriminatory paychecks during the limitations period, each of which

constituted a new unlawful employment practice. *Bazemore*, 478 U.S. at 395-96.

Alternately, even if the Court held that the unlawful employment practice must be a pay-setting decision, the 1998 decision (which occurred during the limitations period) was itself unlawful because it carried forward intentionally discriminatory disparities from prior years in violation of Goodyear's "obligation to eradicate salary disparities based on" sex even when those disparities arose from past decisions. *Id.* at 397. That obligation is not, as respondent claims (Br. 34), some additional "requirement of affirmative conduct by employers." Instead, it is simply another way of describing the basic prohibition against paying similarly situated workers differently because of their sex, and of recognizing that the present implementation of past discriminatory pay decisions constitutes present discrimination. It is true that this creates an incentive for employers to ensure that past decisions given present application are nondiscriminatory. Respondent points to no evidence that this incentive has been unduly burdensome during the decades it has been in effect under the lower courts' interpretation of Title VII or under the EPA. An employer can obviously mitigate that risk by taking steps to ensure that each year's pay decision is nondiscriminatory when it is made, and by monitoring pay disparities as they arise within its workforce. And, as a practical matter, laches places an outer limit on the scope of the obligation to eradicate pay disparities arising from old pay decisions. But within those limitations, so long as an employer bases present pay on past decisions, it remains legally responsible for any resulting ongoing discrimination.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX A

Entire claim survives under both respondent's and petitioner's rule (2): *Pospicil* v. *Buying Office, Inc.*, 71 F. Supp. 2d 1346 (N.D. Ga. 1999); *Kindred* v. *Northome Indus Sch. Dist. No. 363*, 983 F. Supp. 835 (D. Minn. 1997).

APPENDIX B

Claims substantially precluded under respondent's rule, but not petitioner's rule (19): *EEOC* v. *TXI Operations, L.P.*, 394 F. Supp. 2d 868 (N.D. Tex. 2005); *Tenkku* v. *Normandy Bank*, 348 F.3d 737 (CA8 2003); *Butler* v. *Albany Int'l*, 273 F. Supp. 2d 1278 (M.D. Ala. 2003); *Conti* v. *Universal Enterprs., Inc.*, 50 Fed. Appx. 690 (CA6 2002); *Becker* v. *Gannett Satellite Information Network, Inc.*, 10 Fed. Appx. 135 (CA4 2001); *Sowell* v. *Alumina Ceramics, Inc.*, 251 F.3d 678 (CA8 2001); *Simmons* v. *New Public Sch. Dist. No. Eight*, 251 F.3d 1210 (CA8 2001); *Morris* v. *Wallace Community College-Selma*, 125 F. Supp. 2d 1315 (S.D. Ala. 2001); *Rodriguez* v. *Smithkline Beecham*, 224 F.3d 1 (CA1 2000); *Stanziale* v. *Jargowsky*, 200 F.3d 101 (CA3 2000); *Land* v. *Midwest Office Technology, Inc.*, 114 F. Supp. 2d 1121 (D. Kan. 2000); *Belfi* v. *Prendergast*, 191 F.3d 129 (CA2 1999); *Meckenberg* v. *New York City Off-Track Betting*, 42 F. Supp. 2d 359 (S.D.N.Y. 1999); *Snellgrove* v. *Teledyne Abbeville*, 117 F. Supp. 2d 1218 (M.D. Ala. 1999); *Baltazor* v. *Holmes*, 162 F.3d 368 (CA5 1998); *Lenihan* v. *Boeing Co.*, 994 F. Supp. 776 (S.D. Tex. 1998); *Burns* v. *Republic Savings Bank*, 25 F. Supp. 2d 809 (N.D. Ohio 1998); *Travis* v. *Board of Regents of the Univ. of Texas Sys.*, 122 F.3d 259 (CA5 1997); *Sprague* v. *Thorn Americas, Inc.*, 129 F.3d 1355 (CA10 1997).

APPENDIX C

Claim precluded under either party's rule (1): *Rallins* v. *Ohio State Univ.*, 191 F. Supp. 2d 920 (S.D. Ohio 2002).

APPENDIX D

Indeterminate (18): *Kess* v. *Municipal Employees Credit Union of Baltimore, Inc.*, 319 F. Supp. 2d 637 (D. Md. 2004); *Wachter-Young* v. *Ohio Cas. Group*, 236 F. Supp. 2d 1157 (D. Or. 2002); *Riggs* v. *County of Banner*, 159 F. Supp. 2d 1158 (D. Neb. 2001); *Alfieri* v. *SYSCO Food Services Syracuse*, 192 F. Supp. 2d 14 (W.D.N.Y. 2001); *Glunt* v. *GES Exposition Servs., Inc.*, 123 F. Supp. 2d 847 (D. Md. 2000); *Rosa* v. *Brink's Inc.*, 103 F. Supp. 2d 287 (S.D.N.Y. 2000); *Sobba* v. *Pratt Cmty. College & Area Vocational Sch.*, 117 F. Supp. 2d 1043 (D. Kan. 2000); *Farrell* v. *Planters Lifesavers Co.*, 22 F. Supp. 2d 372 (D. N.J. 1998); *Bayles* v. *Fidelity Bank*, 44 F. Supp. 2d 753 (M.D.N.C. 1998); *Jordan* v. *CSX Intermodal, Inc.*, 991 F. Supp. 754 (D. Md. 1998); *Toth* v. *Gates Rubber Co.*, 31 F. Supp. 2d 1249 (D. Col. 1998); *Gearhart* v. *Sears, Roebuck & Co., Inc.*, 27 F. Supp. 2d 1263 (D. Kan. 1998); *Cochrane* v. *Houston Light & Power Co.*, 996 F. Supp. 657 (S.D. Tex. 1998); *Messer* v. *Meno*, 130 F.3d 130 (CA5 1997); *Hernandez* v. *McDonald's Corp.*, 975 F. Supp. 1418 (D. Kan. 1997); *Glover* v. *Kindercare Learning Ctrs., Inc.*, 980 F. Supp. 437 (M.D. Ala. 1997); *Passmore* v. *Kindercare Learning Ctrs., Inc.*, 979 F. Supp. 1413 (M.D. Ala. 1997); *Bakewell* v. *Stephen F. Austin State Univ.*, 975 F. Supp. 858 (E.D. Tex. 1996).

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(11)

Supreme Court, U.S.
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No. 05-1074

In the Supreme Court of the United States

LILLY M. LEDBETTER, PETITIONER

v.

GOODYEAR TIRE AND RUBBER COMPANY, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether or under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, alleging illegal pay discrimination when the allegedly disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period.

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In the Supreme Court of the United States

No. 05-1074

LILLY M. LEDBETTER, PETITIONER

v.

GOODYEAR TIRE AND RUBBER COMPANY, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

This case presents the question whether or under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, alleging illegal pay discrimination when the allegedly disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period. The United States has a significant interest in the resolution of that question. The Attorney General enforces Title VII against public employers, and the Equal Employment Opportunity Commission (EEOC) enforces Title VII against private employers. In addition, Title VII applies to the federal government as an employer. See 42 U.S.C. 2000e-16. The United States, as the principal enforcer of the civil rights laws and the Nation's largest employer, has a strong interest in the proper enforcement of Title VII.

STATEMENT

1. Title VII makes it an "unlawful employment practice" for an employer "to discriminate against any individual with respect to his compensation * * * because of such individual's * * * sex." 42 U.S.C. 2000e-2(a)(1). In general, a Title VII plaintiff must file a charge with the EEOC within 180 days "after the alleged unlawful practice occurred." 42 U.S.C. 2000e-5(e)(1). In States that have an administrative agency with authority to remedy practices prohibited by Title VII, a plaintiff who initially proceeds before that agency must file a charge with the EEOC within 300 days "after the alleged unlawful practice occurred" or within 30 days of when the plaintiff received notification that agency proceedings have been terminated, whichever is earlier. *Ibid.* The State in which this action arose, Alabama, does not have such an agency. Pet. App. 15a. Accordingly, charges in that State are subject to the 180-day limitations period.

2. In February 1979, respondent Goodyear Tire and Rubber Company hired petitioner Lilly Ledbetter to work in its Gadsden, Alabama, tire plant. Pet. App. 5a. Petitioner was classified as a "Supervisor," a precursor to the position later known as "Area Manager." *Ibid.* In the early 1980s, respondent established a system for awarding its Gadsden plant managers annual merit pay raises. *Id.* at 4a. Under that system, the Area Manager's direct supervisor recommended salary increases at the beginning of each calendar year based primarily on an employee's most recent performance ranking. *Ibid.*

The record contains little information on petitioner's performance ranking or her pay raises for the first 12 years that she worked for respondent. Pet. App. 5a. The record does contain such information for the years after that. In

1993, petitioner received a 5.28% raise based on a performance ranking of third out of four Area Managers. *Id.* at 6a. In 1994, petitioner received a 5% raise based on a performance ranking of last. *Ibid.* In 1995, petitioner received both an "individual performance award" and a "top performance award," resulting in a 7.85% raise. *Id.* at 5a-6a. The record does not contain the performance ranking on which that raise was based, but respondent's compensation guidelines reserve such a dual award for employees who achieve the highest level of performance. *Id.* at 6a. In 1996, petitioner was not eligible for a raise because of the timing of her previous raise, but she was ranked fifteenth out of the 16 Area Managers in the performance rankings on which the 1996 raises were based. *Ibid.*

At the end of 1996, petitioner's supervisor did not prepare an evaluation for petitioner because, based on her low ranking from the previous year, she was going to be included in the plant's scheduled layoffs. Pet. App. 7a. Rather than laying her off, however, respondent retained petitioner at her existing salary to serve as a substitute for Area Managers on extended leave. *Id.* at 7a-8a. By the end of 1997, petitioner was making 15% less than the lowest paid male Area Manager and 40% less than the highest paid male Area Manager. *Id.* at 8a.

At the urging of her supervisor, petitioner transferred to a non-supervisory position in January 1998. Pet. App. 8a. Petitioner's performance ranking for the year before her transfer was fifteenth out of 16 Area Managers. *Id.* at 9a. As a result, petitioner did not receive a raise in 1998. *Ibid.*

In March 1998, petitioner filed a completed questionnaire with the EEOC, alleging that she was forced to transfer to a non-supervisory position because of her sex and that she had been subjected to discrimination in her new department. Pet. App. 9a. In July 1998, petitioner filed a

formal charge with the EEOC, reiterating the claims in her questionnaire and adding a claim that she had received less pay than other Area Managers on the basis of her sex. *Ibid.* In November 1998, petitioner accepted respondent's early retirement offer. *Ibid.*

3. In November 1999, petitioner filed suit against respondent in federal district court alleging, *inter alia*, that throughout her 19-year career, respondent had given her disparate pay on the basis of her sex, in violation of Title VII and other provisions. Pet. App. 10a. After a jury trial, the jury found that it was "more likely than not that [respondent] paid [petitioner] an unequal salary because of her sex." *Id.* at 11a. The jury awarded petitioner $223,776 in backpay, $4662 for mental anguish, and $3,285,979 in punitive damages. *Ibid.*

In post-trial proceedings, respondent sought judgment as a matter of law, arguing that Title VII's 180-day limitations period precluded petitioner from challenging the annual merit raise decisions that occurred outside the 180-day period and that there was insufficient evidence to support a jury finding of intentional pay discrimination with respect to the pay decision that occurred within that period. Pet. App. 11a. The district court denied respondent's motion, explaining only that the jury could have found that, but for her sex, petitioner would have received the same pay through November 1998 as an Area Manager who was paid the same as petitioner when she began working for respondent in 1979. *Id.* at 12a. The district court granted respondent's alternative request for a remittitur, reducing the jury's award to $360,000. *Id.* at 11a. Petitioner accepted the remittitur and respondent appealed. *Id.* at 12a.

4. The court of appeals reversed. Pet. App. 1a-37a. The court noted that the parties had assumed for purposes of appeal that petitioner's March 25, 1998, questionnaire was

a Title VII "charge" and that petitioner's July 1998 charge related back to that date. *Id.* at 15a. The court therefore concluded that the relevant Title VII inquiry was whether petitioner had established an unlawful employment practice in the 180-day period before petitioner filed her questionnaire on March 25, 1998, *i.e.*, "whether [petitioner] made out a claim for disparate treatment in pay based on conduct occurring after September 26, 1997." *Ibid.*

Relying on this Court's decision in *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101 (2002), the court of appeals held that petitioner was required to identify a discrete act or acts that occurred within the 180-day period, and that she was barred from challenging discrete acts of discrimination that had occurred before then. Pet. App. 16a-19a. The court held that there was at least one discrete act that petitioner could challenge—respondent's decision to deny her a pay raise in February 1998. *Id.* at 19a.

The court rejected petitioner's argument, based on *Bazemore* v. *Friday*, 478 U.S. 385 (1986), that she could challenge every one of the annual pay raise decisions in her 19-year career with respondent, on the theory that each one of those decisions affected the paychecks she received within the 180-day period. Pet. App. 20a-24a. The court concluded that permitting such a claim to proceed would make the timely-filing requirement "completely illusory," and contravene the central purposes of the timely-filing requirement: to foster prompt resolution of claims, and protect employers from having to defend against stale claims. *Id.* at 23a.

The court then stated that "at least in cases in which the employer has a system for periodically reviewing and re-establishing employee pay, an employee seeking to establish that his or her pay level was unlawfully depressed may look no further into the past than the last affirmative deci-

sion directly affecting the employee's pay immediately preceding the start of the limitations period." Pet. App. 24a. Following that approach, the court allowed petitioner to challenge only two pay raise decisions, the February 1998 pay decision and the last one that occurred before the 180-day period began. *Id.* at 27a-28a. Examining those decisions, the court concluded that no reasonable jury could have found that either decision reflected an intent to discriminate on the basis of sex. *Id.* at 31a-37a.

SUMMARY OF ARGUMENT

Under Title VII, an employee must file an EEOC charge within 180 or 300 days of when the unlawful employment practice occurred depending on whether the alleged practice occurred in a State that has its own agency regulating such practices. 42 U.S.C. 2000e-5(e)(1). Each pay decision is a discrete employment practice, and a discrete employment practice occurs on the day that the decision is made and communicated. Accordingly, an employee must challenge a pay decision within 180 or 300 days of the day that the particular pay decision was made and communicated or lose the ability to recover for it under Title VII.

An employee may not challenge paychecks received during the limitations period on the theory that they perpetuate the effects of discriminatory annual pay decisions that occurred outside the limitations period. The *Evans-Ricks-Lorance* line of decisions squarely forecloses that perpetuation-of-past-discrimination theory. Under those decisions, a plaintiff must identify an intentionally discriminatory act within the limitations period, not a discriminatory act outside the limitations period that has continuing consequences within it. The Court's most recent decision in this area, *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101 (2002), confirms that understanding.

Nothing in *Bazemore* v. *Friday*, 478 U.S. 385 (1986), compels a contrary result. Under that decision, a plaintiff may challenge paychecks within the limitations period when they are made pursuant to an ongoing intentionally discriminatory pay policy. But that is because such payments are themselves intentionally discriminatory, not because they perpetuate prior unchallenged acts of discrimination. An intentionally discriminatory pay policy "discriminates each time it is applied." *Lorance* v. *AT&T Techs., Inc.*, 490 U.S. 900, 912 n.5 (1989). Petitioner's effort to extrapolate support for her perpetuation theory from *Bazemore* cannot be squared with the language of *Bazemore*, the cases preceding *Bazemore*, or the Court's subsequent precedents.

Apart from its lack of grounding in this Court's decisions, the perpetuation theory would create an anomalous rule for pay decisions that has no textual anchor. The terms of Title VII do not distinguish pay decisions from any other kind of employment practice. Nor is there a functional basis for drawing such a distinction. The denial of an employee's desired pay raise cannot be meaningfully distinguished from the denial of a promotion. In both cases, the act can have long-term consequences for pay. Yet it is clear that an employee could not challenge a paycheck on the theory that it perpetuates the consequences of a promotion decision that occurred outside the limitations period. There is no basis for treating discrete pay decisions differently.

The perpetuation theory also contravenes the purposes of Title VII's limitations period. In particular, if accepted, it would reduce the incentive for employees to raise claims of discrimination promptly and require employers to litigate pay decisions that occurred years ago. This case illustrates those effects. Petitioner worked for respondent for approximately 19 years without challenging a single pay

decision. Yet, under petitioner's theory, she was free to challenge any pay decision made during that 19-year period simply by alleging that it had present effects. Neither Title VII, nor this Court's decisions interpreting it, permit that result. Because petitioner does not allege that the challenged pay was made pursuant to an intentionally discriminatory pay policy, but instead argues only that her pay perpetuated discrete intentional discriminatory pay decisions outside the statute of limitations, the court of appeals properly held that her claim is time-barred.

ARGUMENT

TITLE VII REQUIRES A PLAINTIFF ALLEGING INTENTIONAL PAY DISCRIMINATION TO ESTABLISH AN INTENTIONALLY DISCRIMINATORY PAY DECISION WITHIN THE STATUTORY LIMITATIONS PERIOD

Title VII makes it an "unlawful employment practice" for an employer "to discriminate against any individual with respect to his compensation * * * because of such individual's * * * sex." 42 U.S.C. 2000e-2(a)(1). Depending on whether a State has an administrative agency with authority to remedy unlawful practices covered by Title VII, a Title VII plaintiff must file a charge with the EEOC within either 180 or 300 days "after the alleged unlawful employment practice occurred." 42 U.S.C. 2000e-5(e)(1). Petitioner contends that a Title VII plaintiff alleging discrimination in pay can satisfy that requirement by showing that she received less pay than male employees in the same position within the applicable 180-day or 300-day period, even if the disparate pay is the result of discrete pay decisions that occurred outside that period. Under petitioner's theory, Title VII establishes no limit on how many years into the past a plaintiff may reach to find the pay raise decision

or decisions that caused her to receive less pay within the applicable limitations period.

This case illustrates the boundlessness of petitioner's theory. Petitioner worked for respondent for 19 years, but she did not file a charge of pay discrimination until the last year of her employment. Yet, under petitioner's theory, she was free to challenge as intentionally discriminatory every pay raise decision made during her 19-year career. As discussed below, neither Title VII nor the Court's precedents countenance that result. Under Title VII, an employee must challenge a pay decision within 180 or 300 days of its occurrence, and an employee may not circumvent that limitations period by challenging a paycheck received many years later on the theory that it perpetuates the effects of an unchallenged pay decision that occurred outside the limitations period.

A. An Employee May Not Circumvent Title VII's Limitations Period By Challenging A Paycheck On The Theory That It Perpetuates The Effects Of Prior Unchallenged Pay Decisions

1. In *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101, 110 (2002), the Court held that a "discrete" act occurs "on the day that it 'happened,'" and that a party therefore must file an EEOC charge within 180 or 300 days of that date or "lose the ability to recover for it." The Court identified as discrete acts refusals to hire, failures to promote, denials of transfers, and terminations. *Id.* at 114. In contrast, the Court in *Morgan* held that "[a] hostile environment claim is composed of a series of separate acts that collectively constitute one 'unlawful employment practice.'" *Id.* at 117. The Court therefore held that a hostile work environment claim is timely if the employee files a

charge "within 180 or 300 days of any act that is part of the hostile work environment." *Id.* at 118.

Like a refusal to hire, a failure to promote, or a termination, an annual pay raise decision is typically a discrete act, not a series of separate acts that together constitute an unlawful employment practice. Each time an employer denies a pay raise or sets a pay raise lower because of a person's sex, it constitutes a discrete "unlawful employment practice" because each such act "discriminate[s] against [that] individual with respect to his compensation * * * because of such individual's * * * sex." 42 U.S.C. 2000e-2(a)(1). Accordingly, as is true of other discrete acts that can have long term consequences with respect to pay or other benefits, such as a refusal to hire, a failure to promote, or a termination, a person must file a charge challenging a discrete pay raise decision within 180 or 300 days after the decision is made and communicated "or lose the ability to recover for it." *Morgan*, 536 U.S. at 110.

2. Petitioner seeks to circumvent that rule by claiming (Br. 21) that the delivery of paychecks itself constitutes an unlawful employment practice that occurred within the applicable period because that act perpetuated the effects of the past unchallenged pay raise decisions. That kind of perpetuation-of-past-discrimination claim, however, is directly foreclosed by the *"Evans-Ricks-Lorance"* line of precedents.

In *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), an employee failed to file a timely charge to her termination. *Id.* at 554-555. After she was rehired, the employer used her rehiring date, rather than her original date of hire, to determine her seniority. *Id.* at 555. The employee challenged that practice on the theory that it perpetuated the effects of the discrimination that occurred when she was terminated on the basis of her sex. *Id.* at 556. While ac-

knowledging that the use of her rehiring date to determine her seniority would perpetuate a past act of allegedly unlawful intentional discrimination, the Court rejected the employee's claim. *Id.* at 557-558. The Court explained that the critical inquiry under Title VII is not whether there are continuing consequences of a past act, but whether "any present *violation* exists." *Id.* at 558. Because the employee had not alleged that the practice of using her rehiring date to measure seniority was itself an intentionally discriminatory act, she could not establish a violation of Title VII. *Ibid.*

In *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), the college denied Ricks tenure and issued him a one-year contract after which his employment with the college would end. *Id.* at 252-253. Ricks failed to file a charge within 180 days of the denial of tenure, and instead filed a charge several months before his contract expired. *Id.* at 254-255. The Court rejected Ricks's claim that he could wait to challenge the tenure decision as intentionally discriminatory until it resulted in the loss of his job, explaining that "[t]he proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." *Id.* at 258 (citation omitted). The Court also rejected Ricks's argument that he could challenge the termination itself on the theory that it perpetuated the effects of the past intentionally discriminatory denial of tenure. *Ibid.* The Court explained that, under *Evans*, "[t]he emphasis is not upon the effects of earlier employment decisions; rather, it is [upon] whether any present *violation* exists." *Ibid.* (citation and internal quotation marks omitted).

Likewise, in *Lorance* v. *AT&T Technologies, Inc.*, 490 U.S. 900 (1989), female employees challenged a change in the seniority system on the ground that it was intentionally

altered in order to protect incumbent males. They did not do so, however, until more than three years after the change was made. *Id.* at 905-906. The Court held that the employees could not resurrect their untimely challenge by claiming that an unlawful employment practice occurred not only when the seniority system was changed, but also each time its concrete effects were felt. *Id.* at 906. Relying on *Evans* and *Ricks*, the Court explained that a Title VII plaintiff may not assert a claim "that is wholly dependent on discriminatory conduct occurring well outside the period of limitations." *Id.* at 908.[1]

Evans, *Ricks*, and *Lorance* foreclose petitioner's perpetuation-of-past-discrimination theory. Under those decisions, "[i]t is simply insufficient" for petitioner to allege that the delivery of paychecks within the limitations period is unlawful because it "gives present effect" to past discriminatory pay raise decisions and therefore "perpetuates the consequences of forbidden discrimination." *Ricks*, 449 U.S. at 258 (citation and internal quotation marks omitted). Nor can petitioner escape the force of those decisions by describing the repeated distribution of paychecks as a "continuing violation." Pet. Br. 16-17 & n.9. Under the *Evans-Ricks-Lorance* line of cases, the distribution of a paycheck

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[1] In response to *Lorance*, Congress amended Title VII to provide that an "unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose * * * when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system." 42 U.S.C. 2000e-5(e)(2). Congress did not alter the timeliness requirement for any other employment practice. Accordingly, while *Lorance*'s specific holding on when a discriminatorily adopted *seniority system* must be challenged has been superseded by statute, its analysis of Title VII's timeliness requirement remains authoritative for other practices.

that is allegedly deflated as a result of discrete pay decisions that occurred outside the limitations is simply not a *violation* of Title VII. *A fortiori*, the repeated distribution of such paychecks cannot be a *continuing* violation.

B. An Employee May Challenge The Delivery Of A Paycheck As An Unlawful Employment Practice When It Is Made Pursuant To A Facially Discriminatory Policy

The fact that a paycheck that purportedly perpetuates intentional discrimination outside the limitations period does not satisfy the statute of limitations does not mean that a paycheck may never do so. A paycheck that is disseminated pursuant to a facially discriminatory pay policy itself constitutes an act of intentional discrimination and therefore is an "unlawful employment practice."

For example, every reduced payment that a woman receives pursuant to a policy that systematically requires a woman to be paid less than a man because of her sex is a separate act of intentional discrimination. That is true even when the facially discriminatory policy originates outside the limitations period. As long as the facially discriminatory policy is operative within the limitations period and it automatically requires a woman to receive less pay than a man because of her sex, each payment pursuant to the policy represents an intentional act of discrimination, and the victim of that policy may file a charge within 180 or 300 days of each such reduced paycheck.

There is a crucial difference, however, in the case of challenges to pay decisions made pursuant to such a discriminatory pay structure. Challenges to applications of a facially discriminatory policy do not depend on the theory that a practice is unlawful because it *perpetuates* a prior unchallenged discrete act. Rather, such challenges depend on the recognition that when a facially discriminatory policy

remains in effect, unlawful intentional discrimination is *presently occurring* with the delivery of each paycheck pursuant to the policy. See *Lorance*, 490 U.S. at 912 n.5.

In *Lorance*, the Court recognized this important distinction and held that an employee could challenge a facially discriminatory seniority system "at any time." 490 U.S. at 911. The Court explained that "a facially discriminatory system (*e.g.*, one that assigns men twice the seniority that women receive for the same amount of time served) by definition discriminates each time it is applied." *Id.* at 912 n.5. By contrast, with "a facially neutral system the discriminatory act occurs *only* at the time of adoption, for each application is nondiscriminatory (seniority accrues for men and women on an identical basis)." *Ibid.*

The same analysis applies to facially discriminatory pay systems. A facially discriminatory pay policy (*e.g.*, one that requires women to be paid at three-quarters of the rate for men in the same job category) "by definition discriminates each time it is applied." *Lorance*, 490 U.S. at 912 n.5. Because petitioner has not alleged, much less established, that respondent has a facially discriminatory pay policy, that theory of recovery is not available here.

C. An Employee May Likewise Challenge The Delivery Of A Paycheck As An Unlawful Employment Practice When It Is Made Pursuant To An Employer's Ongoing Intentionally Discriminatory Pay Structure

1. The same considerations that apply with respect to paychecks issued under a facially discriminatory pay system attach when an employer delivers the check pursuant to an ongoing but unwritten intentionally discriminatory pay structure. While they present different issues of proof, there is no functional difference between a written policy that requires all women to be paid at three-quarters of the

rate of men, and an unwritten policy that requires all women to be paid at three-quarters of the rate that men are paid. Like a facially discriminatory policy, such an ongoing policy of intentionally paying women less than men because of their sex "by definition discriminates each time it is applied." *Lorance*, 490 U.S. at 912 n.5.

Bazemore v. *Friday*, 478 U.S. 385 (1986), illustrates such an ongoing intentionally discriminatory pay structure. In that case, an Extension Service had a pre-Title VII policy of maintaining racially segregated branches and paying black employees less than white employees. *Id.* at 394. After Title VII was enacted, the Service merged the branches and eliminated some of the difference in pay between black and white employees. *Id.* at 394-395. But it admittedly continued to intentionally pay its black employees less than its-white employees doing the same job because of their race. *Ibid.* The court of appeals had concluded that there was no violation of Title VII because the policy of intentionally paying black employees less than white employees had originated prior to the enactment of Title VII. *Id.* at 395.

This Court found the court of appeals' error "too obvious to warrant extended discussion: that the Extension Service discriminated with respect to salaries *prior* to the time it was covered by Title VII does not excuse perpetuating that discrimination *after* the Extension Service became covered by Title VII." 478 U.S. at 395. The Court explained that "[a] pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice, it is liable under that statute." *Ibid.* The Court added that when an employer continues to engage in such a policy of systematic

intentional discrimination, "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." *Id.* at 395-396.

The lesson of *Bazemore* is that when an employer has an ongoing intentionally discriminatory pay structure, each paycheck delivered pursuant to that policy is a discrete wrong that may be separately challenged, regardless of whether the intentionally discriminatory policy began before Title VII was enacted or more than 180 or 300 days prior to the filing of a Title VII charge. Petitioner has not alleged that she received paychecks pursuant to such an ongoing intentionally discriminatory pay policy, and the record does not support the conclusion that such a policy existed. Instead, petitioner alleged only that she received reduced pay within the limitations period as a result of a series of discrete intentionally discriminatory pay raise decisions, all but one of which occurred outside the limitations period. *Bazemore* is therefore inapposite here.

2. Relying on the Court's statement that "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII," 478 U.S. at 395, petitioner seeks to extrapolate from *Bazemore* the far-reaching principle that an employer has an ongoing affirmative duty to rectify any discrete discriminatory pay decision, no matter how far in the past that discrete act occurred, and that any paycheck that perpetuates the effects of such past discriminatory acts is itself a new act of unlawful discrimination. Pet. Br. 21. For several reasons, that reading of *Bazemore* is unsustainable.

First, the Court in *Bazemore* did not suggest that it was breaking any new ground in the key passage of the opinion, much less departing from *Evans* or *Ricks*. To the contrary,

the Court viewed the principle it was stating as "too obvious to warrant extended discussion." 478 U.S. at 395. There is nothing "obvious" about the affirmative duty/perpetuation principle that petitioner seeks to extrapolate from *Bazemore*. To the contrary, if *Bazemore* had adopted that principle, it would have constituted a wholly unprecedented interpretation of Title VII, and would have been in substantial tension with the Court's prior decisions in *Evans* and *Ricks*. Such a decision clearly would have warranted "extended discussion." On the other hand, viewing *Bazemore* as holding only that an employer may not continue an intentionally discriminatory pay policy after Title VII was enacted simply because it began such a policy earlier is, as the Court stated, "too obvious to warrant extended discussion." *Ibid.*

Second, while the Court described the Service as having engaged in a practice of "perpetuating" discrimination, 478 U.S. at 395, it used that term to describe a practice of continuing a policy of intentionally discriminating on the basis of race, not simply failing to undo the effects of *past* discrimination. That is clear from the following key passage: "[a] pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in *that act or practice*, it is liable under that statute." *Ibid.* (emphasis added). The "pattern or practice" that would have violated Title VII but for the fact that it had not become effective was the pattern or practice of intentionally paying black employees less than white employees because of their race. Accordingly, when the Court referred to an employee's liability for the continuation of *"that act or practice,"* it necessarily meant continuation of the act or practice of intentionally paying black employees less than white

employees because of their race, not the act or practice of failing to undo the effects of prior discrimination.

Third, petitioner's reading of *Bazemore* would force that decision into conflict with the Court's earlier holdings in *Evans* and *Ricks*, and with its subsequent holding in *Lorance*, that a Title VII plaintiff may not seek recovery based on a theory that a practice is unlawful only because it perpetuates the effects of past discrete acts of discrimination that were not timely challenged. See pp. 10-12, *supra*. In contrast, limiting *Bazemore* to situations where an employer has an ongoing intentionally discriminatory pay structure fits hand in glove with those decisions.

Indeed, the Court in *Bazemore* reconciled its decision with *Evans* on precisely that basis. The Court explained that in *Evans*, the plaintiff alleged that the practice of giving her rehiring date seniority "gave present effect" to the past intentionally discriminatory act of terminating her "and thereby perpetuated the consequences of forbidden discrimination." *Bazemore*, 478 U.S. at 396-397 n.6. By contrast, the plaintiffs in *Bazemore* argued that "the present salary structure" was itself a "discriminatory pay structure." *Ibid.*[2] See *Morgan*, 536 U.S. at 112 (characterizing *Bazemore* as a "pattern-or-practice case" where there was an ongoing "discriminatory salary structure" that had begun prior to enactment of Title VII); *Shea* v. *Rice*, 409 F.3d 448, 456-457 (D.C. Cir. 2005); *id.* at 456-457 (Williams, J., concurring) (explaining that the key to determining whether a plaintiff may invoke *Bazemore* is whether she has established a "discriminatory salary structure").

Thus, *Bazemore* did not sanction a broad perpetuation theory for pay cases. Nor did it adopt the far-reaching pay-

[2] In its brief in *Bazemore*, the United States specifically argued that the salary structure at issue "remained intentionally discriminatory." Br. for Fed. Pet'rs, at 20 n.18, *Bazemore*, *supra* (No. 85-93).

check rule advanced by petitioner. Instead, it relied on a limited and obvious principle that has no application here.

D. Petitioner's Perpetuation Theory Creates An Anomalous Distinction Between Pay Claims And Other Claims, Most Obviously Denial Of Promotion Claims

Petitioner's perpetuation theory not only has no footing in this Court's decisions, but it also would create a rule for pay cases that is different from the rule that would apply to any other kind of Title VII case. Indeed, petitioner nowhere suggests that her perpetuation theory would apply to any employment practice other than pay. The text of Title VII, however, draws no distinction between a challenge to a pay practice and a challenge to any other kind of employment practice. See 42 U.S.C. 2000e-2(a)(1) (making it an "unlawful employment practice" for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment"). As petitioner notes, a pay decision can have pay consequences years into the future. But so too can a failure to hire, a failure to promote, a layoff, a denial of tenure, and a termination. Yet, each of those is a discrete act that must be challenged within 180 or 300 days of its occurrence or the plaintiff loses the right to challenge it. See *Morgan*, 536 U.S. at 114-115; *Ricks*, 449 U.S. at 258.

A discrete pay decision, such as the denial of an annual raise or a decision to set an employee's annual raise at 2% rather than 5% of her base salary, is particularly difficult to distinguish in principle from a failure to promote. A promotion is ordinarily, if not invariably, accompanied by a pay increase, often a greater increase than would be available for any in-grade adjustment of pay. Indeed, in many cases, that is the principal reason that an employee desires the

promotion. When an employee fails to obtain the promotion and the accompanying pay raise, that can have lasting consequences on pay that are indistinguishable from the denial of an annual pay raise. Yet, an employee cannot challenge the delivery of a paycheck years later on the theory that the reduced pay perpetuates the consequences of the prior discriminatory failure to promote. *Morgan*, 536 U.S. at 114-115. There is no apparent reason why Congress would have wished to treat discrete in-grade pay decisions differently from promotion or other decisions affecting benefits. And there is nothing in the text of Title VII that would permit such a distinction to be drawn.

E. Petitioner's Perpetuation Theory Thwarts The Achievement Of The Purposes Of The Limitations Period

Petitioner's perpetuation-of-past-discrimination theory is also fundamentally at odds with the important purposes of the limitations period. Title VII's limitations period serves two principal purposes. First, "[b]y choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination." *Morgan*, 536 U.S. at 109 (citation omitted). Second, Congress sought to "protect employers from the burden of defending claims arising from employment decisions that are long past." *Ricks*, 449 U.S. at 256-257.

Petitioner's perpetuation theory undercuts both of those purposes. By allowing an employee to challenge pay raise decisions years later, petitioner's theory removes a significant part of the incentive for an employee to promptly challenge pay raise decisions that are thought to be discriminatory. Furthermore, accepting petitioner's theory would mean that a plaintiff could force an employer to defend a series of pay decisions made by managers years ago. In-

deed, petitioner in this very case put respondent in the position of having to defend pay decisions going back 19 years. There is no evidence that Congress intended to impose such an extraordinary and impractical record-keeping burden on employers, much less with the burden of having to sift through any evidence that may be available with respect to pay decisions made years or even decades earlier in order to adjudicate pay claims.

Petitioner contends (Br. 29) that employees retain an incentive to file early in order to avoid the potential loss of extra backpay, the loss of evidence to prove a case, and the possibility of a laches defense. But none of those potential incentives is a substitute for the clear guidance provided by a statute of limitations. Indeed, it is particularly odd to point to the possibility of a laches defense as a basis to avoid the most natural reading of a *statute* of limitations. Nor will any of the potential incentives eliminate an employee's ability to wait and see what happens over a number of years with the prospect of being able to challenge every single pay decision whenever suit is brought. Indeed, petitioner views it as a virtue of her proposal that employees will be able to do just that. Br. 25-26. The crucial point, however, is that regardless of the extent to which the factors cited by petitioner afford an incentive to file early, they do not provide anything approaching the incentive that comes from applying the usual rule that a plaintiff who fails to challenge an employment practice within 180 or 300 days of its occurrence forever loses the right to complain about that practice.

Petitioner also argues (Br. 28) that employers can adequately protect themselves by saving their employment records and by asserting a laches defense when a plaintiff unreasonably delays and the delay prejudices the employer's defense. But Title VII's short limitations period is

intended to eliminate stale claims, not just ensure that employers will not be prejudiced in the their ability to defend themselves against stale charges of discrimination. The statute of limitations is intended to allow an employer to regard a past act as having no further potential legal consequence, *Evans*, 431 U.S. at 558, and to enable an employer to avoid the costs, burdens, and risks associated with litigation over that past act, including the burden of having to litigate a fact-bound laches defense which may not lend itself to disposition at the summary judgment stage, given the intensely factual nature of a laches defense. *Ricks*, 449 U.S. at 256-267. Those purposes would be thwarted if petitioner's perpetuation theory were adopted.

F. Petitioner's Remaining Arguments Are Unpersuasive

Petitioner raises a number of other arguments in support of her position. None is persuasive.

1. Petitioner's contention that a violation of the Act occurs only when an employee receives disparate pay is incorrect

Petitioner argues (Br. 22-23) that an intentionally discriminatory pay decision is not an unlawful employment practice when it first occurs because only the delivery of unequal pay can constitute discrimination "with respect to * * * compensation." 42 U.S.C. 2000e-2(a)(1). That argument is without merit. When an employer denies a pay raise or sets a pay raise at 2% rather 5% based on an individual's sex, that employer plainly discriminates "with respect to * * * compensation." *Ibid.* An employee may not experience the most acute effects of that unlawful employment practice until she receives unequal pay. But under Title VII, a discrete unlawful employment practice occurs when a discriminatory employment decision has been "made and communicated," not when the actual effects of

that discriminatory act are most concretely experienced. *Ricks*, 449 U.S. at 258. That does not create any anomaly when it comes to enforcement. If an employee has not received any pay under the pay decision at issue, she may seek an injunction against the unlawful practice, but simply would not be entitled to backpay.

2. Petitioner's policy arguments do not justify extending the limitations period for challenges to disparate pay decisions

Petitioner argues (Br. 26-28) that application of the ordinary 180- or 300-day limitations period for discrete acts would have an adverse effect in pay cases because employees will ordinarily have little reason to suspect discrimination within the applicable period. But there is no reason to assume that employees will be less sensitive to *pay* decisions than other decisions involving such matters as promotions or benefits. Indeed, there is some reason to suspect that employees will be particularly vigilant concerning the bottom line of take-home pay. Furthermore, if an employer has actually discriminated in pay, other red flags may be raised during the limitations period, whether it is a performance ranking that does not accurately reflect the employee's performance (Pet. Br. 5), unequal treatment in assignments, on-the-job harassment, a supervisor's threat not to give a good performance rating unless the employee submits to his sexual advances (*ibid.*), a supervisor's statement that it is easier to downgrade females than males (*id.* at 6), or statements from other female employees that they are experiencing discrimination (*id.* at 7-8).

Petitioner also worries (Br. 25-26) that employees may refrain from challenging pay decisions immediately because the impact of any one decision may seem minor in comparison to the cost of alienating the employer. But few employ-

ees are likely to regard the denial of a raise, or a 2% rather than a 5% raise, as a trivial event. And there is no reason to conclude that employees are incapable of appreciating the possible long-term consequences of such a pay decision, as opposed to other decisions that may have long-term consequences, like the denial of a promotion or benefits. Moreover, even if petitioner were correct in characterizing an ingrade pay denial as relatively trivial, that is not obviously a factor that counts in favor of more favorable treatment for limitations purposes, than more dramatic action like a failure to promote.

In any event, the two concerns raised by petitioner are not unique to pay cases. As for the first concern, an employee may see little hard evidence of discrimination when an employer hires her for one job, but rejects her for another higher-paying one, or when an employer fails to promote her at the first opportunity. As for the second concern, many employees might conclude that challenging such hiring and promotion decisions as acts of discrimination so early in their tenure would not be worth the possible cost to their careers. Yet Congress has concluded that those concerns are outweighed by the desirability of encouraging prompt resolution of discrimination complaints and of protecting employers from the burdens and disruptions of litigation once 180 or 300 days have passed. That congressional judgment applies equally to pay cases.

3. Petitioner's reliance on lower court decisions, the EEOC's guidance, and Congress's amendment for seniority systems is misplaced

Petitioner contends (Br. 29-32) that the Court should defer to the appellate courts that have adopted her perpetuation theory for pay cases. But this Court of course does not defer to the legal analysis of the lower courts, and that

is particularly true when, as here, a key step in the analysis is the proper interpretation of one of this Court's precedents (*i.e., Bazemore*). The lower court decisions that support petitioner's position turn on an improper reading of *Bazemore* for the reasons discussed above.

In any event, some courts have correctly recognized that an employee may not challenge the delivery of paychecks on the theory that they continue the effects of past discrete pay decisions outside the limitations period and that *Bazemore* is limited to challenges to ongoing discriminatory pay structures. See, *e.g.*, *Shea* v. *Rice*, 409 F.3d 448, 453-454 (D.C. Cir. 2005) (An employee may challenge "a persistent discriminatory salary structure," but may not "attempt to breathe new life into discriminatory acts that occurred outside the limitations period * * * by relying on their lingering effects in the present."); *Dasgupta* v. *University of Wisconsin Bd. of Regents*, 121 F.3d 1138, 1140 (7th Cir. 1997) ("[A]n untimely Title VII suit cannot be revived by pointing to effects within the limitations period of unlawful acts that occurred earlier," because "[t]hat would make employers pay compensation for violations that were no longer actionable and would thus unravel the statute of limitations.").

Like the courts of appeals that have endorsed petitioner's theory, the EEOC's support for that theory also rests on a misreading of *Bazemore*. See United States Equal Employment Opportunity Comm'n, *Compliance Manual*, Section 2-IV.C & n.183 (July 2005). Accordingly, it lacks persuasive force and is not entitled to deference. *Morgan*, 536 U.S. at 110 n.6.

For the same reason, Congress's enactment of legislation that altered the timely-filing requirement for seniority systems, but not for other employment practices, does not assist petitioner. As petitioner argues (Br. 38-39), that leg-

islation left *Bazemore* intact. But as discussed above, *Bazemore* does not support petitioner's perpetuation theory. And just as the legislation left *Bazemore* intact, it also left *Evans* and *Ricks* intact, and petitioner's perpetuation theory is inconsistent with those decisions. What was not left intact, of course, was the prospective significance of the *Lorance* decision, but beyond that the legislation left the Court's precedents untouched. Certainly, nothing in the Senate Report cited by petitioner (Br. 39) can alter this Court's precedents.

4. The law governing limitations periods in other contexts does not support petitioner's claim

Finally, petitioner seeks to rely (Br. 34-38) on interpretations of statutes of limitations in other contexts to support her view that a new limitations period springs to life each time an employee receives unequal pay as a result of prior unchallenged acts of discrimination. But those examples show only that when violations repeat themselves, each violation triggers a new limitations period. That principle is not applicable here because the distribution of unequal pay that is the result of prior unchallenged pay decisions is not a violation of Title VII.

a. As petitioner notes (Br. 34-35), under the Equal Pay Act of 1963, each paycheck that delivers less pay to a female employee than a male employee performing the same work is a separate violation of the Act, giving rise to a new cause of action and a new limitations period. See *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 208 (1974). But that is because the text of the Act explicitly defines the unlawful employment practice as the employer's act of "paying wages to employees * * * at a rate less than the rate at which he pays wages to employees of the opposite sex * * * for equal work." 29 U.S.C. 206(d)(1). Under the

terms of that statutory prohibition, each time the employer "pay[s] wages" at a lower rate for the same work, there is a violation of the Act, without regard to when the disparity originated or whether such a payment is an act of intentional discrimination. And since each such reduced payment constitutes a violation, each such payment triggers a new limitations period.

By contrast, as already discussed, the payment of unequal wages that is the result of prior unchallenged pay decisions is not a violation of Title VII. Under Title VII, the occurrence of that payment therefore does not trigger a new limitations period.[3]

b. Petitioner's other recurring violation examples are inapposite for the same reason. Under the Fair Labor Standards Act of 1938, a violation occurs, and a new limitations period therefore arises, each time an employer fails to "pay" a minimum wage for the hours worked, 29 U.S.C. 206(a), and each time an employee fails to "receive[] [overtime] compensation." 29 U.S.C. 207(a)(1). Similarly, in the case of an installment obligation, each time a payment that is due is not made on time, it constitutes a breach of the obligation. Accordingly, in such cases,"'a new cause of action,' carrying its own limitations period, 'arises from the date each payment is missed.'" *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. of California, Inc.*, 522 U.S. 192, 208 (1997) (citation omitted). Likewise, because each sale that is made pursuant to an ongoing agreement to fix prices is itself a violation of the antitrust laws, each such sale starts a new statute of limitations. See *Klehr* v. *A. O. Smith Corp.*, 521 U.S. 179, 189 (1997).

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[3] Petitioner originally brought an Equal Pay Act claim against respondent, but that was "abandoned or dismissed" before trial and is not before this Court. Pet. App. 10a n.7.

The difference between those cases and this one is that the act that petitioner relies on to trigger the new limitations period—the dissemination of a paycheck that allegedly is infected by prior unchallenged pay decisions—is itself not a violation of the statute at issue. Its occurrence therefore cannot trigger a new limitations period.

c. Petitioner also seeks to rely (Br. 36-37) on precedent under the National Labor Relations Act. As discussed above, differences among statutes limit the value of such comparisons, but this Court's interpretation of that Act undermines rather than supports petitioner's statute of limitations argument. In *Local Lodge No. 1424, Int'l Ass'n of Machinists* v. *NLRB*, 362 U.S. 411 (1960), an employer and a union agreed to a clause in a collective bargaining agreement that required employees to join the union within 45 days of the clause's execution. Under NLRB precedents, agreeing to the clause and applying the clause both constituted an unfair labor practice. A complaint was issued that was untimely as a challenge to the agreement, but timely as a challenge to an application of the agreement. The Court held that the challenge could not proceed because it would have the effect of "reviving a legally defunct unfair labor practice." *Id.* at 417. See *Lorance*, 490 U.S. at 910-912 (discussing *Machinsts*).

Petitioner's Title VII theory shares the same defect. Allowing petitioner to challenge the pay she received within the limitations period based on the theory that it is the result of discrete pay raise decisions that occurred outside the limitations period would effectively allow petitioner to "reviv[e] a legally defunct" challenge to pay raise decisions made more than a decade ago.

G. The Judgment Of The Court Of Appeals Should Be Affirmed

Although the court of appeals correctly held that petitioner's Title VII claim was time-barred, it left open the possibility that an employer could reach outside the limitations period back to "the last affirmative decision directly affecting the employee's pay immediately preceding the start of the limitations period." Pet. App. 24a. The Court should rule out that possibility and make clear that an employee must point to a discrete act of discrimination within the limitations period.

For the reasons discussed above, the principle that governs this case is that an employee may not seek to prove a Title VII violation based on the theory that pay received within the limitations period is the result of discrete pay decisions that occurred outside the limitations period. It makes no difference whether the discrete pay decision occurred 20 years ago or is the last pay decision that occurred before the commencement of the limitations period. Similarly, it makes no difference whether the employer reevaluates salary decisions periodically or gives increases where no such reevaluation occurs. The court of appeals' judgment should therefore be affirmed on the ground that Title VII does not authorize the kind of perpetuation-of-past-discrimination claim that petitioner asserts.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

LILLY M. LEDBETTER,

Petitioner,

v.

GOODYEAR TIRE AND RUBBER COMPANY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTERESTS OF AMICI CURIAE

1. The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents a membership of over three million businesses and business organizations of every size and in every industry sector and geographic region of the country. The Chamber has been a voice for the business community for more than ninety years. To fulfill this role, the Chamber frequently files *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community.[1]

2. The National Federation of Independent Business Legal Foundation ("NFIB Legal Foundation"), is a nonprofit, public interest law firm established to be a voice for small business in the nation's courts and the legal resource for small business. The NFIB Legal Foundation is the legal arm of the National Federation of Independent Business (NFIB), which is the nation's leading small-business advocacy association, with offices in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

3. This case involves the administration of Title VII of the Civil Rights Act of 1964 ("Title VII" or "Act"), 42 U.S.C. § 2000e *et seq.*, an act to which the vast majority of Chamber and NFIB members are subject. Title VII's specific charge-filing requirement, which operates as a statute of limitations, was adopted in large measure to protect employers from the burden of defending decisions made in the distant past. Indeed, Congress selected for Title VII a particularly brief period of limitation precisely because it recognized the special need to put such workplace controversies to rest quickly.

4. Petitioner, however, seeks a rule that would effectively eliminate any meaningful period of limitations in certain kinds of pay discrimination claims, allowing an employee to wait

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1. Petitioner and respondent have given consent to the filing of amicus briefs. Both parties' letters of consent are on file in the Office of the Clerk. No party has authored this brief in whole or in part, and no party has made a monetary contribution to the preparation or filing of this brief. *See* S. Ct. R. 37.6.

years or even decades to challenge an allegedly discriminatory decision so long as the economic consequences of that decision have continued into the limitations period. Such a rule would be irreconcilable with Congress' design for the administration of Title VII, and would subject the employers covered by the Act to damages for entirely innocent decisions that have nonetheless become difficult or impossible to defend solely because of the passage of time.

5. The Chamber, NFIB, and their members are particularly well positioned to explain to the Court the practical implications of such a rule. Because such a rule would impose an unwarranted and excessive burden on employers, the Chamber and NFIB urge this Court to reject it.

SUMMARY OF ARGUMENT

1. To be timely, an administrative charge of discrimination under Title VII of the Civil Rights Act of 1964 must be filed with the appropriate agency within a relatively brief period of time after the alleged unlawful employment practice occurred. *See* 42 U.S.C. § 2000e-5(e)(1). Petitioner concedes that "[i]f the unlawful employment practice in a disparate pay case is the pay-setting *decision* (and only that decision), then the violation occurs at the time of that decision and the limitations period runs from that date." Pet. br. at 18 (emphasis in original). Petitioner claims, however, that the limitations period should run from the date on which the *consequences* of the challenged decision becomes real to the complainant, here when each paycheck reflecting allegedly disparate compensation is issued.

This is not a question of first impression for the Court. In fact, the Court has held on a number of occasions that in a discrimination case, "the alleged illegal act [and thus the alleged unlawful employment practice is] the . . . decision" to discriminate.[2] Once "the operative decision [is] made – and

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2. *Chardon v. Fernandez*, 454 U.S. 6, 8 (1982) (discrimination claims under 42 U.S.C. § 1983); *see also United Airlines, Inc. v. Evans*, 431 U.S. 553, 554-58 (1977); *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980) ("the filing limitations period[] commenced at the time the tenure decision was

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notice given," the limitations period begins to run. *Chardon*, 454 U.S. at 8.

Most recently, in *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), the Court confirmed that this rule of law applies to all "discrete acts" of alleged discrimination, even when these discrete acts, taken together, form a pattern of discrimination or continuing course of conduct. A "discrete act," the Court held, is marked by two distinguishing characteristics: (a) they "are easy to identify"; and (b) "[e]ach [such] incident . . . constitutes a separate actionable 'unlawful employment practice.'" 536 U.S. at 114.[3] And because each discrete act is both easy to identify (it "happens" on a specific date) and is separately actionable, the disappointed employee is expected to file a charge of discrimination shortly after the incident occurs. *Id.* at 114-15.

Like the promotion and other claims described in *Morgan*, pay claims fit in the "discrete act" category. They "happen" at once, on a specific date, not incrementally over an extended period of time. Each compensation decision is independently actionable. Petitioner's pay claim is governed by this general rule of limitations.

2. Petitioner offers two reasons for a special rule applicable only to compensation cases. First, she argues that the time limit selected by Congress is too short in the pay dispute context, primarily because would-be complainants are less willing to "rock the boat" with respect to compensation claims than they are with respect to "more serious" violations.

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made and communicated"); *Bazemore v. Friday*, 478 U.S. 385, 396 n.6 (1986) (where salary system maintained *within* the limitations period was a "mere continuation of the pre-1965 discriminatory pay structure, . . . [employer could not claim that it had] made all [of its] employment *decisions* in a wholly nondiscriminatory way" within the period and thus limitations period renewed with each paycheck) (emphasis added).

3. Conversely, hostile environment claims are cumulative in nature. It is difficult or impossible for would-be complainants to determine whether any particular incident of harassment is, by itself, actionable, and in most cases, the course of conduct becomes actionable only after a number of such incidents combine to create the hostile environment. Special accrual rules apply to such claims. *See Morgan*, 536 U.S. at 115-17.

Pet. br. at 25-26. Additionally, petitioner notes that the rules of limitation applied to all other discrete acts make it more difficult for Title VII to fulfill its statutory purpose, which she claims to be providing compensation to injured parties.

Congress, however, purposefully selected "quite obviously short deadlines" for filing charges of discrimination under Title VII[4] because it recognized that periods of limitation "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."[5] Statutes of limitation *always* cut off the right to seek compensation – that is their only purpose – but doing so furthers another legislative goal comprehended in Title VII. And while a charge of discrimination undoubtedly "rocks the boat" at work for all concerned, whether it comes early or late, the Court concluded in *Ricks* that this provides no basis for modifying the limitations rule Congress prescribed.[6]

The rule urged by petitioner would punish innocent employers, reward indolence or gamesmanship by complainants, and would be irreconcilable with the unambiguous intent of Congress, which intended that Title VII claims be rapidly resolved. This case is a perfect example of the machinations invited by the rule petitioner seeks. Petitioner remained silent about her claim of discrimination throughout her tenure with Goodyear and waited until she had decided to retire before filing her charge. By the time the matter went to trial, the manager she had accused of discrimination had died of cancer, and the employer had been authorized by federal law to dispose of the records it had once maintained regarding the decisions she belatedly challenged. This sort of delay – whether resulting from tactical considerations or inattention – is antithetical to the manner in which Congress envisioned Title VII claims would be administered.

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4. *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980).

5. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974).

6. *Ricks*, 449 U.S. at 256 (rejecting argument that, because a charge might damage "working relationships and divert attention from the proper fulfillment of job responsibilities," limitations period did not begin to run when decision was made and made known to complainant).

Second, petitioner finds support for a special rule of limitations in *Bazemore v. Friday*, 478 U.S. 385 (1986). This Court has previously explained, however, that *Bazemore*'s reach is limited to its facts: a facially discriminatory pay system, operating into the limitations period. Such a *de jure* discriminatory system renders every pay decision made – and every paycheck issued – within the period an independently actionable decision. An employer that perpetuates such a facially discriminatory system cannot defend a lawsuit by arguing that it had also engaged in that conduct outside of the limitations period without complaint.[7]

Petitioner alleges no comparable facts. She claims that her pay was depressed because certain individual Goodyear managers falsified data and defied Goodyear's policies and procedures, primarily because she refused to date one of them. As a result, petitioner claims, she was rated unfairly on her performance evaluation; this poor evaluation, she claims, then led to a pay increase that was smaller than she deserved. Petitioner complains of discrete acts of discrimination, subject to the general rule, not the sort of facially biased pay structure that might justify application of the *Bazemore* rule.

3. In an attempt to identify the "alleged unlawful employment" practice that triggers the limitations period, petitioner suggests that a court must focus on the *results* of the salary setting process, "not [on] the [employer's] compensation *decisions*." Pet. br. at 23 (emphasis in original). A focus on results is not only contrary to the Court's prior cases, however, but it effectively cleaves the substantive Title VII claim from the intent requirement that is its essential prerequisite. A violation of the Act requires the marriage of two things: an *intent* to discriminate (*i.e.*, a decision) and an *act* of discrimination (*i.e.*, an adverse employment action).[8]

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7. *See Lorance v. AT&T Tech., Inc.*, 490 U.S. 900, 912 n.5 (1989) (*superseded by statute on other grounds*).

8. *See United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (critical factual inquiry in *every* Title VII disparate treatment case is "whether the defendant *intentionally* discriminated against the plaintiff") (emphasis added); *see also Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2411-12 (adverse employment action required for discrimination claim).

Petitioner claims that the intent to discriminate and the adverse consequences can be separated by years or even decades, and that the individual possessing the biased intent need not be (or even know) the individual who effects the adverse employment action. That remarkable proposition cannot be squared with the Court's prior cases. If intent is the *sina qua non* of a disparate treatment claim, the "violation" that triggers the limitation period must include it.

ARGUMENT

I. All Title VII Claims Are Subject To The Act's Express Charge-Filing Limitations Period

A. For Discrete Acts Of Discrimination, The Title VII Charge-Filing Limitations Period Commences When The Challenged Employment Decision Is Made, And Is Not Renewed Every Time The Consequences Of That Decision Are Made Palpable

Congress has specified that, in order to preserve a claim of discrimination, an administrative charge of discrimination "*shall be filed* within one hundred and eighty days [or 300 days, depending on the jurisdiction] after the alleged unlawful employment practice occurred. . . ." 42 U.S.C. § 2000e-5(e)(1) (emphasis added). This requirement does not vary on its face depending on the form of discrimination involved; whether the employer is alleged to have discriminated in hiring or with respect to promotions or terminations, the statute treats all allegedly discriminatory decisions the same. In this sense, the statutory language is unqualified and absolute.

"Determining the timeliness of [an] EEOC complaint, and [an] ensuing lawsuit," then, requires the court to "identify precisely the 'unlawful employment practice'" of which the charge complains and the date on which it "occurred." *Ricks*, 449 U.S. at 257; *Morgan*, 536 U.S. at 110. The Court has addressed this question on several occasions, and on each occasion, it has held unambiguously that, with the exception of hostile environment harassment claims, Title VII's limitations period begins to run when the alleged

discriminatory decision is made and communicated, not when the complainant feels the consequences of that decision.[9]

a. *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977). Evans was employed as a flight attendant at United Air Lines. She was forced to resign when she married, however, because the airline had a rule against employing married female flight attendants. 431 U.S. at 554.

The no-marriage rule was subsequently eliminated, and Evans was rehired, but the airline refused to give her seniority credit for the period during which she was prohibited from working for the airline. *Id.* at 554-55. Evans sued, but she did not seek back pay for the period during which she had been compelled to stop working. Rather, she complained that her then-current pay rate was unlawfully depressed by the company's prior discrimination. *Id.* at 557. Accordingly, she sought compensation for the shortfall in each of the paychecks she had received within the limitations period. *Id.*

The Court held, however, that Evans' then-current, ongoing economic disadvantage – the shortfall in each of her paychecks – was merely a lingering consequence of a *prior* statutory violation (*i.e.*, a discriminatory decision combined with an adverse employment action) occurring outside the limitations period, and not a statutory violation itself. Evans' claim, therefore, was time-barred. *Id.* at 558-59.

"United was entitled to treat that past act [*i.e.* Evan's termination] as lawful after respondent failed to file a charge of discrimination" within the statutorily prescribed period. *Id.* at 558. Although Evans claimed that a *current* violation existed because each paycheck she received was smaller than the check she would have received had there been no

9. The Eleventh Circuit thought it at least possible that in the search for an improperly motivated affirmative decision directly affecting pay a complainant, "may reach outside the limitations period created with her EEOC charge no further than the last such decision immediately preceding the start of the limitations period." *Ledbetter v. Goodyear Tire & Rubber Co.*, 421 F.3d 1169, 1177-78 (11th Cir. 2005). The Court noted however, that "[w]e do not hold that an employee may reach back even that far; what we hold is that she may reach back no further." *Id.* at 1178. *Amici* agree with the *result* reached below, but disagree that any decision occurring outside the limitations period may be challenged.

discrimination, the Court held that the violation occurred when the events that *caused* the disparity happened, not when the continuing *consequences* of those events became painful. *Id.* Nearly every act of unlawful discrimination has an ongoing financial impact, the Court reasoned, and a rule that treats *consequences* rather than *decisions* as statutory violations "would substitute a claim for seniority credit for almost every claim which is barred by limitations." *Id.* at 560. The timeliness of a claim, the Court held, cannot depend on such easily manipulated matters of pleading. *Id.*

b. *Delaware State Coll. v. Ricks*, 449 U.S. 250 (1980). Ricks was denied tenure by the college where he worked, but, as was the college's custom, he was given a one-year "terminal contract." 449 U.S. at 253. Ricks waited until the one-year contract had ended before he filed his charge of discrimination. *Id. at* 254.

The Court held that the delayed charge came too late. Again, the Court held that the proper focus "is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful. . . . The emphasis is not upon the effects of earlier employment decisions; rather, it 'is [upon] whether any present *violation* exists.'" *Id.* at 258 (quoting *Evans*, 431 U.S. at 558) (emphasis in original). The "discriminatory act," the Court held, was the decision to deny Ricks tenure, and "the filing limitations period[] commenced at the time the tenure decision was made and communicated to Ricks." *Id.* at 258.

c. In *Chardon v. Fernandez*, 454 U.S. 6 (1981), two employees were terminated by the Puerto Rican Department of Education. Each was informed in advance of the date on which the termination would be effected. 454 U.S. at 7-8. Well after receiving the letters, but shortly after their actual termination, both filed lawsuits under 42 U.S.C. § 1983. *Id.*

The Court held again that the limitations period begins to run when the employer's decision is made and is communicated, not when the plaintiff felt the decision's pinch. "The fact of termination," the Court held, "is not an illegal act." *Id.* at 8. Rather, "the alleged illegal act [is] the . . . decision"

to terminate. *Id.* Once "the operative decision was made – and notice given," the limitations period began to run. *Id.*

d. Following *Evans, Ricks,* and *Chardon,* courts continued to have difficulty distinguishing for timeliness purposes between the discriminatory *acts* and their *consequences.* As a result, a number of courts continued to apply a "continuing violations" doctrine applied to out-dated claims that were factually or contextually related to discriminatory decisions made *within* the limitations period. Under this doctrine, a series of independent but related promotion decisions, for example, might have constituted a "continuing violation" so long as at least one such decision was made within the period.

Although "[t]he continuing violations theory [had been] contradicted"[10] by the Court on a number of occasions, it did not die easily. Most recently in *Morgan,* the Court again faced a claim that a series of connected but separately actionable employment decisions could constitute a "continuing violation" and therefore extend the limitations period for an indefinite period. Again, the Court "contradicted" the theory.

The *Morgan* Court focused on the statutory language that requires charges to be filed promptly after the statutory violation "occurs." The Court divided the universe of statutory violations into two distinct, mutually exclusive categories. The first category is composed of what the Court called "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire. . . ." *Morgan,* 536 U.S. at 114. For each such discrete act, the charging party must file a charge within the requisite period or forever lose the opportunity to challenge that decision. *Id.*

Discrete acts, the Court observed, are characterized by two defining characteristics: (a) they "are easy to identify"; and (b) "[e]ach [such] incident . . . constitutes a separate actionable 'unlawful employment practice.'" *Id.* And because each discrete act is both easy to identify – it "happens" on a specific date – and is separately actionable, the complainant is expected to file a charge of discrimination shortly after the incident occurs. *Id.* at 114-15. This is true, the Court held, even

10. *Lorance,* 490 U.S. at 906 ("The continuing violation theory is contradicted most clearly by two decisions, [*Evans* and *Ricks*]").

if it the act is part of a series of separately actionable discriminatory decisions that together form a pattern extending into the limitations period. *Id.*

The Court distinguished this common category of Title VII violations from the *sui generis* category of hostile environment claims. The Court observed that, in a hostile environment case, "[t]he 'unlawful employment practice' . . . cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." *Id.* at 115. The statutory violation "is comprised of a series of separate acts that collectively constitute one 'unlawful employment practice'" because the individual events forming the violation are not separately actionable. For that reason, the Court said, the "practice" "occurs" when the last of the events transpires, and if one such event "occurs" within the limitations period, the complainant can challenge the entire chain of events, including those that occurred outside the limitations period. *Id.* at 117.

B. Pay Decisions Are Discrete Acts

Pay claims fall into the *Morgan* "discrete acts" category because they possess both of the diagnostic criteria for discrete act treatment. First, pay decisions "happen" at once on a specific date, not incrementally over an extended period of time. In this case, for example, Goodyear decided petitioner's starting salary on a specific day when she started work, and thereafter decided on her annual salary increase at a specific time each year. Petitioner does not allege that she was unaware when these decisions were made.[11]

11. Petitioner notes that the salaries of *other* employees are generally kept confidential and suggests that this fact warrants an effectively unlimited time for filing a charge of discrimination. As explained in the text and *infra* at 7-10, the Court has previously and repeatedly held that the limitations period begins to run when the challenged *decision* is made and communicated, not when the complainant has amassed some specific quantity of evidence suggesting discrimination; such a rule would be unworkable and would lead to vastly differing treatment for indistinguishable claims. In any event, petitioner *in this case* does not claim to have been ignorant of the facts necessary to support a charge, and it would be unnecessary and unwarranted for the Court to reach out to decide

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Second, each compensation decision is independently actionable. Unlike a harassment claim, which may be comprised of a series of jokes or uncivil comments made over time, none of which would independently be a violation of Title VII, one incident of pay discrimination is invariably "actionable on its own." *Morgan*, 536 U.S. at 115. Because petitioner was *entitled* to file a charge with respect to each discrete pay decision she believed to have been discriminatory, she was *obligated* to do so. She was not entitled to wait until she had decided to retire and then attempt to reach back to challenge decisions made much earlier.

II. Categorizing Pay Claims As Discrete Acts Fairly Accommodates Competing Societal Interests, And Is Consistent With *Bazemore*

Petitioner claims that, for two reasons, a different rule of limitations should apply to what she calls "disparate pay claims" than is routinely applied to every other form of non-harassment employment discrimination claim under Title VII. First, petitioner laments the "unfairness" that would result if the commonly understood rule of limitations is applied here: compensation discrepancies are said to be too small to "be worth fighting over," Pet. br. at 14; the limitations period selected by Congress – "a few short months" – is said to be too short, *id.*; and employees are hypothesized to be more reluctant in the pay context to "rock the boat" by filing a charge than they are with respect to "more serious" violations. Pet. br. at 25-26. The many errors in this argument are explained in Section A below.

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whether or in what circumstances equitable tolling or the application of estoppel might be appropriate. The lower courts have proven themselves to be capable of developing the law on these equitable doctrines on a case-by-case basis. *See, e.g., Nunnally v. MacCausland*, 996 F.2d 1, 4 (1st Cir. 1993) ("relief from limitations periods through equitable tolling ... remains subject to careful case-by-case scrutiny."); *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987) (equitable tolling may apply "when defendant has wrongfully deceived or misled the plaintiff in order to conceal the existence of a cause of action" and equitable estoppel may apply when, "despite the plaintiff's knowledge of the facts, the defendant engages in intentional misconduct to cause the plaintiff to miss the filing deadline.").

Second, petitioner reads the Court's decision in *Bazemore v. Friday*, 478 U.S. 385 (1986), as permitting complainants in pay cases to wait years or even decades before filing a charge of discrimination. As explained in Section B below, *Bazemore*'s holding is far more limited than petitioner suggests, and, in fact, that decision is irreconcilable with the application of a special continuing violations rule in this case.

A. It Is Both Fair And Appropriate To Require Complainants To File Charges Of Discrimination Promptly

1. Strict Adherence to Rules of Limitation Guarantees Evenhanded Administration of the Law

Petitioner claims that a rule permitting an employee to challenge a salary-setting decision years after it is made — indeed, after the complainant's career is over and she has decided to retire, as petitioner did here — would fulfill the purpose of Title VII which, she says, is to make whole victims of discrimination. Pet. br. at 24. To be sure, Title VII's aim to make victims whole is *one* of the Act's important purposes, but like all major pieces of legislation, Title VII represents the accommodation of competing values and it is a mistake to view it in monolithic terms.

If compensation had been Congress' only interest in passing Title VII, it could have enacted the statute petitioner envisions, *i.e.*, one that had no meaningful period of limitations and left employers to their common law defenses such as laches. Doing so would certainly have made it possible to "make [more] persons whole." Pet. br. at 24. Congress made a different choice, however. After substantial debate, Congress consciously selected "quite obviously short deadlines" for filing charges of discrimination under Title VII. *Mohasco*, 447 U.S. at 825. It did so because it recognized that periods of limitations "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *American Pipe*, 414 U.S. at 554. A period of

limitation, then, represents a balance between competing interests: it

> "afford[s] plaintiffs what the legislature deems a reasonable time to present their claims, [while simultaneously] protect[ing] defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise."

United States v. Kubrick, 444 U.S. 111, 117 (1979).

And so in *Morgan*, the Court reiterated that "strict adherence [to statutes of limitations] is the best guarantee of evenhanded administration of the law." *Morgan*, 536 U.S. at 108 (*quoting Mohasco*, 447 U.S. at 826); *see also Kavanagh v. Noble*, 332 U.S. 535, 539 (1947) ("Such periods are established to cut off rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary. . . . Remedies for resulting inequities are to be provided by Congress, not the courts.") (internal citation omitted).

Petitioner argues that the "few short months"[12] Pet. br. at 14, selected by Congress as the appropriate limitations period is too short. In fact, the brief period of limitations selected by Congress serves compelling public interests, as explained *infra* at 13, but more importantly, it was Congress' choice to make. Petitioner's complaint is better addressed to the legislature.

Similarly, petitioner argues that employees are unwilling to "rock the boat" by filing a charge, and therefore should be given special dispensation (although only in pay cases) for filing charges long after the operative decisions have been made and announced. The Court rejected almost precisely this argument in *Ricks*. There, the plaintiff had argued that requiring a timely charge would damage "working relationships and divert attention from the proper fulfillment of job responsibilities," and yet the Court enforced the statutorily prescribed limitations period. *Ricks*, 449 U.S. at 256. A reluctance to "rock the boat" — or even a genuine fear

12. The period is actually either six or ten months, approximately, depending on the jurisdiction.

of retaliation – will not excuse a complainant's failure to utilize the Act's procedures. *See, e.g., Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 270 (4th Cir. 2001) ("The bringing of a retaliation claim [], rather than failing to report . . . is the proper method for dealing with retaliatory acts.").

Finally, petitioner argues that a would-be complainant should not be punished for giving the employer the "benefit of the doubt," or the time necessary to see the error of its ways and do-the-right-thing. Pet. br. at 14. Again, this contention is answered by *Ricks*. There, the plaintiff had filed a grievance and hoped that, through this process, the college would reverse its decision. The possibility that the employer could conceivably "un-do" a decision, however, does not alter the date on which the decision was made, and, as the Court has repeatedly held, once "the operative decision [has been] made – and notice given," the limitations period begins to run. *Chardon*, 454 U.S. at 8; *see also Ricks*, 449 U.S. at 261 ("limitations periods normally commence when the employer's decision is made.").

2. Strict Enforcement Of Title VII's Brief Limitations Period Is Necessary To Accommodate Employer and Employee Rights

The interest in repose is particularly compelling in the employment setting. To defeat a claim of discrimination, an employer must be able to articulate its rationale for the challenged decision, and to do so convincingly. The plaintiff attempts to show at trial that the rationale proffered by the employer is merely a pretext for discrimination, and the jury must decide whom to believe. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000); *St. Mary's Honor Ctr. v. Hicks.*, 509 U.S. 502, 506-07, 513-14 (1993). In most instances, the testimony devolves to a "he said/she said" battle of recollections; the most vivid rendition of events often prevails.

But an employer's ability to tell its story dissipates sharply as time passes. Memories fade; managers quit, retire or die, business units are reorganized, disassembled, or sold; tasks are centralized, dispersed, or abandoned altogether. Unless an employer receives prompt notice that it will be called upon to defend a specific decision or describe a series of events, it

will have no "opportunity to gather and preserve the evidence with which to sustain [itself]. . . ." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 372 (1977) (quoting Congressman Erlenborn, 117 Cong. Rec. 31972 (1971)).

This problem is becoming ever more acute for employers, exacerbated by trends in employee mobility, mergers, acquisitions, reductions-in-force, divestitures and reorganizations. The likelihood that all of the decision-makers, witnesses, and human resources representatives an employer needs to tell its story convincingly will still be working for the defendant-employer at the time of a trial dwindles as the challenged decision recedes into the past. The American workforce currently has a median job tenure of only four years.[13] This number is substantially lower (2.9) for workers between ages 25 and 30, and is lower still (1.3) for workers in their early twenties. *Id.* It also varies by job category. For example, employees in "administrative and support services" and "accommodation and food services" have median tenures of only 1.9 and 1.6 years respectively. *Id.* Thus when an employee of even moderate tenure delays in bringing a claim, the employer is unlikely to have the necessary witnesses at its disposal to defend itself.

Petitioner assures the Court that, "in reality, [true prejudice to the employer will be] rare in disparate pay cases [because] employers document the basis of pay decisions and retain those records for years." Pet. br. at 28. The suggestion is misguided for four reasons. First, in practice, employers rarely record detailed explanations as to why one employee might have received an incrementally lower or higher pay increase than his or her co-worker. Second, even if this kind of documentation existed, few defendants would be likely to prevail at a trial – even when the challenged decision was entirely bias-free – by meeting the live, detailed, and often tear-stained testimony of the plaintiff with a few words recorded on a document.

Third, the Equal Employment Opportunity Commission

13. *See* Employee Tenure Summary, Sept. 8, 2006; U.S. Department of Labor, Bureau of Labor Statistics News, *www.bls.gov/news.release/tenure.nr0.htm* (last viewed on 10/23/06).

("EEOC") requires that employers keep only certain specified employment records (including those relating to "rates of pay or other terms of compensation"), and then only requires that the records be kept for one year. *See* 29 C.F.R. § 1602.14. The agency selected one year as the appropriate period "so that there [would be] *no possibility* that an employer or labor organization [would] have legally destroyed its employment records before being notified that a charge [had] been filed." 54 Fed. Reg. 6551 (Feb. 13, 1989) (emphasis added).[14] If petitioner prevails here, employers would be obligated to keep these records, not for one year, but in perpetuity.

Finally, petitioner's suggestion that an employer can avoid material prejudice merely by improving its record retention program is undermined by the facts of this case. Petitioner claims that she was denied the compensation she was owed because she refused to go out on a date with her then-supervisor, Mike Maudsley. Pet. br. at 5-6. But it is unlikely that Goodyear keeps any records that might be relevant to this sort of allegation, and Mr. Maudsley was unavailable either to admit or deny petitioner's allegations; he had died of cancer by the time the case went to trial.

3. The Equitable Defense of Laches Is Not An Adequate Substitute For Congress' Design

Congress intended timeliness questions under Title VII to be analyzed as they are with most causes of action: an express limitations period sets the time available to a complainant for filing, and the courts retain the equitable authority to ameliorate the operation of that limitation in particular cases where exceptional facts justify deviation from the general rule. *See Morgan*, 536 U.S. at 113-14. Petitioner seeks to turn this statutory scheme upside down. In her view, complainants in salary-setting cases should generally be

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14. *See also EEOC v. Dresser Indus., Inc.*, 668 F.2d 1199, 1204 (11th Cir. 1982) ("Once defendants satisfy the EEOC's record retention requirement in Title VII enforcement actions, they should not be punished for failing to exceed standards mandated by the very Commission that promulgated them."); *see also Jeffries v. Chicago Transit Authority*, 770 F.2d 676, 681 (7th Cir. 1985) ("We do not read [29 C.F.R § 1602.14] to require the [company] to maintain records indefinately [sic].").

excused from an obligation to file charges promptly, and the employer's hopes should rest with the laches defense.

Not only would that suggestion do violence to Congress' evident design for administration of the Act, it would effectively prevent employers from mounting a vigorous defense to even the most baseless claims. The laches defense is only available under "the most unusual circumstances," and poses a "particularly difficult [standard for employers] to establish." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 440 (1975) (Marshall, J. concurring).[15] For this reason, laches is not an adequate substitute for a period of limitations; as the Court has recently recognized, statutes of limitation exist for the very purpose of creating "a presumption [of prejudice from the passage of time] which renders proof [of prejudice] unnecessary." *Stogner v. California*, 539 U.S. 607, 616 (2003), (*quoting with approval Wood v. Carpenter*, 101 U.S. 135, 139 (1879)).

That presumption is necessary because, in the great run of cases, significant delay will almost always result in prejudice that is nonetheless unprovable. Even when all of the relevant witnesses are alive and can be located, they may also be unavailable or unhelpful – relocated, disinclined to volunteer to help a former employer, or simply unable to recall the events at issue. In these circumstances, the employer will typically be unable to make the particularized showing of prejudice courts often require.[16] No one can doubt that the memories of

15. For example, it *might* be sufficient in some cases to show that a key witness has died, but in others it might not. *See, e.g., Springer v. Partners in Care*, 17 F. Supp. 2d 133, 139 (E.D.N.Y. 1998) (denying defendant's laches defense even though defendant "no longer possess[ed] documentation relating to plaintiff or his employment" and no longer employed "any individuals who possess personal knowledge of plaintiff's claims."); *Myree v. Local 41, IBEW*, 789 F. Supp. 597, 616 (W.D.N.Y. 1992) (finding that laches did not bar plaintiff's recovery, even though several individuals involved in events relevant to the lawsuit, who "might have been key witnesses for the defense," were dead); *Harris v. Ford Motor Co.*, 487 F. Supp. 429, 432 (W.D. Mo. 1980) (denying defendant's laches defense because "prejudice is not enough.").

16. *See, e.g., Brown v. Continental Can Co.*, 765 F.2d 810 (9th Cir. 1985) (laches unavailable even though prejudice to defendant was likely through loss of witnesses and documents); *Anderson v. Anheuser-Busch, Inc.*, 65 F. Supp. 2d 218 (S.D.N.Y. 1999) (twelve year delay between notice of (Cont'd)

witnesses fade over time, and that their testimony regarding historical events – who said what to whom and why – will become correspondingly less vivid and less compelling as time passes. But it typically will be impossible for the employer to show with specificity the important details that its witnesses (a) formerly remembered but (b) have now forgotten, and if those forgotten details cannot be recalled, they cannot be proven in aid of a laches defense. Similarly, an employer can generally claim prejudice stemming from the loss of a document only if it can (a) prove that the document once existed and (b) describe to some degree what the document contained and why it would have helped. Such a showing will often be impossible if the document was destroyed before the employer knew it existed or that it would be needed.[17]

Statutes of limitations are the general rule precisely because that kind of prejudice is assumed to occur as a matter of course, but is, in most circumstances, difficult or impossible to prove. It is in this respect, and for this reason, that rules of limitation create "a presumption [of prejudice] which renders proof unnecessary." *Stogner*, 539 U.S. at 616.

B. Petitioner Advances A Fundamental Misreading Of Bazemore

1. *Bazemore* applies only to facially discriminatory systems perpetuated within the limitation period

Petitioner finds support for a special compensation-only limitations period in *Bazemore*, but she extends that case far

(Cont'd)
right to sue and lawsuit insufficient to warrant application of laches); *Askins v. Imperial Reading Corp.*, 420 F. Supp. 413 (W.D. Va. 1976) (four year delay insufficient to warrant application of laches, where defendant could not particularize its claim of what testimony had been affected by delay).

17. Although, as noted *supra*, the EEOC requires that employers keep certain specific records, it is impossible for an employer to know what *other* records might prove vital to its defense until issue is joined by the filing of a charge. For example, travel information – not among the kinds of records the EEOC requires the employer to keep – showing that the complainant was in another city at the time of a critical meeting or conversation could be devastating to complainant's credibility – and could thus win the employer a trial – yet may well be innocently and lawfully destroyed while the complainant waits years to file a charge.

beyond what its factual context and the language of the opinion allow. Prior to the passage of Title VII, the state agriculture extension service in North Carolina had been organized into two separate divisions -- a so-called "Negro Branch," which was staffed exclusively by African Americans and served only black farmers throughout the state, and a second branch (which had no racial designation) that was staffed only by whites. 478 U.S. at 390-91. The white employees who served white farmers had a pay scale applicable only to them. Agents in the "Negro Branch" had their own formal pay structure, and it uniformly paid them less to do the same work as similarly situated whites. *Id.*

When Title VII became law, the agency eliminated its race-specific labels and began slowly reducing the pay disparities that had previously existed. The disparities continued after Title VII became applicable to the states in 1972, however, and work assignments allegedly continued to be race-based. *Id.* at 391. The *Bazemore* plaintiffs complained that the state agency was, at the time of the suit (and thus within the limitations period), perpetuating "separate wage systems" that deliberately paid African Americans less than similarly situated white employees. *See* 1986 No. 85-93, WL 728395 at * 6-9 (Jan. 10, 1986). (brief of *Bazemore* petitioners). Moreover, the perpetuation of the prior segregated pay structure had been acknowledged in writing by the agency's director. *Id.* at 9.

The court of appeals held that the employees' discrimination claims were time-barred because the pay *raises* given within the limitations period were not adverse to black employees, but this Court reversed. In defining when the actionable violation had occurred, the Court held that an employer could not defend a *current facially discriminatory pay structure* by arguing that it had previously engaged in the same discriminatory conduct without complaint. 478 U.S. 386-88. "[T]o the extent an employer continue[s] to engage in [a discriminatory] act or practice [within the limitations period], it is liable" under Title VII, even if it also made discriminatory decisions *before* the limitations period without a timely charge having been filed. *Id.* at 394-96 (emphasis added). The Court distinguished its prior decision in *Evans* by noting that in that

case, the "Respondent [had] made no allegation that *the seniority system itself* was intentionally designed to discriminate." *Id.* at 396 n.6 (emphasis added). The Court thus drew a bright line between "system[s] intentionally designed to discriminate" operating within the limitations period, which can be challenged every time the system is applied (the facts in *Bazemore*) and compensation decisions made pursuant to a facially neutral pay structure, which must be challenged at the time they occur.

The Court also noted that in *Evans*, the employer's discriminatory *decision* had been made and effected well outside the limitations period, and that the employer had made no *decision* within the limitations period other than the refusal to un-do the consequences of those prior, time-barred decisions. In *Bazemore*, by contrast,

> petitioners are alleging that in continuing to pay blacks less than similarly situated whites, respondents *have not from the date of the Act forward "made all their employment* ***decisions*** *in a wholly nondiscriminatory way." Ibid.* Our holding in no sense gives legal effect to the [time-barred] actions, but, consistent with *Evans* . . . , focuses on the present salary structure, which is illegal *if it is a mere continuation of the pre-1965 discriminatory pay structure.*

478 U.S. at 396 n.6 (emphasis added). It was in this context that Justice Brennan observed that "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." *Id.* at 395-96.

In *Lorance*, the Court had another occasion to explain the relationship between the *Evans* general rule and the *Bazemore* exception. In that case, the plaintiffs challenged an allegedly discriminatory seniority system. Although the system was neutral on its face, the plaintiffs alleged that it had been adopted with the specific purpose of discriminating against women. The Court explained that with

> "a facially *neutral* system [that nonetheless was specifically designed to discriminate], the

> discriminatory act occurs only at the time of adoption. . . . [Conversely,] a facially *discriminatory* system [like the pay structure at issue in *Bazemore*] by definition discriminates every time it is applied. This is a material difference for purposes of the analysis we employed in *Evans* and *Ricks* — which focuses on the timing of the discriminatory act for purposes of the statute of limitations. It . . . also [explains the "each week's paycheck" language] of *Bazemore v. Friday. . . ." Id.* at 912 n.5 (emphasis added).[18]

Lorance thus underscored the ingredient essential to application of the *Bazemore* exception to the *Evans/Ricks* general rule: a "facially discriminatory system" discriminates every time it is applied, and thus is a violation of the Act "occurs" whenever it operates.[19] A facially neutral system is not.[20]

2. The *Bazemore* exception to the general rule does not apply here

Petitioner's claims are resolved by *Evans* and *Ricks*, not by *Bazemore*. Petitioner does not allege what the *Bazemore* rule requires: a facially discriminatory pay structure, established and perpetuated specifically to impose disparate pay. To the contrary, petitioner insists that she was the victim of Goodyear

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18. The *Morgan* Court also specifically noted that in *Bazemore*, it had considered a discriminatory "salary structure," 536 U.S. at 112.

19. It would not be enough for application of the *Bazemore* exception for a plaintiff to allege that the employer's facially neutral pay system discriminates against a protected class as a whole — *i.e.*, a pattern or practice of discrimination. Rather, the *Bazemore* exception applies *only* when the pay system is discriminatory *on its face*, and is imposed by the employer for that very purpose, as was the case in *Bazemore*.

20. *Lorance's* application to seniority systems was superseded by the Civil Rights Act of 1991, but nothing in the 1991 Act undermined the Court's definition of a "facially discriminatory system," or the Court's analysis of *Bazemore*. *See, e.g., Law v. Continental Airlines Corp. Inc.*, 399 F.3d 330, 333 (D.C. Cir. 2005) (quoting *Lorance*, 490 U.S. at 912)). The statute also left the *Evans/Ricks* limitations rule unaffected outside of the seniority system context, *see, e.g.*, 137 Cong. Rec. S15485 (Oct. 30, 1991) (interpretive memorandum of Sen. Danforth ("[t]his legislation should not be interpreted to affect the sound rulings of the Supreme Court regarding 'continuing violations' theory under Title VII.").

managers who *violated* the employer's explicit rules *against* discrimination and ignored the company's pay guidelines. *See. e.g.*, Pet. br. at 6 (supervisor "did not make his pay recommendations in accordance with Goodyear's purported policy").[21] Petitioner never argued that Goodyear's salary structure was designed and implemented in order to discriminate or that it was facially discriminatory; she argued that her relatively low pay was the down-stream consequence of falsified audits of her work and a poor performance evaluation given to her because she refused to go on a date with her boss. *See* Pet. br. at 5.[22]

In sum, petitioner alleges conduct by managers taken *in contravention* of the employer's policies and procedures

21. According to petitioner, Goodyear based annual pay raises on recommendations from the Business Center Manager, who made recommendations based on annual employee performance evaluations. These annual evaluations were in turn based on production data, managerial judgments about the employee's work performance, and on reports from Performance Auditors about employee performance. *See* Pet. br. at 5.

22. Petitioner's complaint regarding the persisting impact of now-time-barred pay decisions theoretically might also have been cast as an argument in support of a disparate impact claim, but there are three reasons such a claim is no answer for petitioner here. First, petitioner never pursued a disparate impact claim, and so it is too late to do so now. *See Raytheon Co. v. Hernandez*, 540 U.S. 44, 53-54 (2003). Second, the Court has held that a pay disparity based on some factor other than sex — the essential attribute of a disparate impact claim — is never actionable in a Title VII sex discrimination case. *County of Washington v. Gunther*, 452 U.S. 161, 170-71 (1981) ("[E]mployers [can] defend against charges of [sex] discrimination where their pay differentials are based on a bona fide use of 'other factors other than sex.'") (citations omitted); *see also Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 710, n.20 (1978) (gender-based disparity in pension benefits "determined by . . . actual life span [and] thus [is] 'based on [a] factor other than sex,' and consequently [is] immune from challenge"). Finally, discrimination in compensation is prohibited by Section 703(a)(1); the Court observed just last term in *Smith v. City of Jackson*, that the language of that provision "does not encompass disparate impact liability." 544 U.S. 228, 236 n. 6 (2005) (construing identical language in the Age Discrimination in Employment Act). Conversely, Section 703(a)(2), the Title VII language that provides the textual basis for disparate impact claims, does not prohibit compensation discrimination, but only those employer actions that "tend to deprive individuals of employment opportunities or otherwise adversely affect their status as employees."

(what petitioner calls the company's "neutral merit system," Pet. br. at 5, 26); *Bazemore* involved and implemented policies and procedures *designed and implemented* by the employer from the outset to disadvantage the protected class. *Bazemore* does not apply.[23]

C. Petitioner's Attempt to Divorce Intent From Adverse Action Is Fundamentally At Odds With The Purpose of Title VII And The Court's Prior Cases

A claim of disparate treatment discrimination requires the coincidence of two elements: an *intent* to discriminate and an *act* of discrimination, *i.e.*, an adverse employment action. *See United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (critical factual inquiry in *every* Title VII disparate treatment case is "whether the defendant *intentionally* discriminated against the plaintiff") (emphasis added); *see also Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2411-12 (2006) (adverse employment action required for discrimination claim). It is not sufficient for a plaintiff to show only a biased turn of mind or an inequality of result.[24]

In petitioner's view, however, at least in the salary setting context, the two need not coincide in any respect; the animus and the adverse result can be separated by decades, and the individuals responsible for taking the adverse action — here issuing a pay check, or at least causing a computer to do so — need not be the same as (or even known by) the individual

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23. *Compare Shea v. Rice*, 409 F.3d 448 (D.C. Cir. 2005) (denying employer's motion to dismiss because plaintiff alleged a currently operating facially discriminatory diversity policy that set up a two-class pay structure); *Law*, 399 F.3d at 333 (explaining that a facially discriminatory system *categorically*, *purposefully*, and *invariably* treats similarly situated employees differently) (quoting *Lorance*, 490 U.S. at 912)); *see also Int'l Union, UAW, v. Johnson Controls, Inc.*, 499 U.S. 187, 198 (1991) (employer policy expressly designed and purposefully implemented to deny women certain employment opportunities).

24. Petitioner argues in passing that the court of appeals erred when it concluded that the only salary setting decision made within the limitations period was not biased. *See. e.g.*, Pet. br. 11. Petitioner did not seek, and the Court did not grant, *certiorari* to resolve that question, however, and, as the case comes to the Court, we presume that this decision was correct and address it no further.

who harbored the discriminatory intent, who may be retired, dead, or working elsewhere when the adverse action occurs. Thus, petitioner concedes that

> If the unlawful employment practice in a disparate pay case is the pay-setting *decision* (and only that decision), then the violation occurs at the time of that decision and the limitations period runs from that date.

Pet. br. at 18.

But petitioner and her *amici* insist that Title VII prohibits discrimination with respect to the *result* of the salary setting process, "not with respect to compensation *decisions*." Pet. br. at 23 (emphasis in original). Petitioner's *amici* posit that "[d]iscriminatory paychecks are not actionable simply because they are 'sufficiently related' to a pay *decision* that occurred outside the limitations period. . . . They are actionable because they pay less money to an employee because of sex." Br. of Nat'l Partnership for Women & Families, *et al.* at 8-9 (emphasis added).

As noted above, the Court has repeatedly and expressly held otherwise; it is the *decision* that causes the limitations period to commence. In *Ricks*, the Court held that "the limitations period[] commenced at the time the [allegedly discriminatory] *decision* was made and communicated" to the complainant. In *Chardon* (a § 1983 discrimination case), the Court again held that the limitations period began to run when "the operative decision was made – and notice [was] given" – to the complainant. 454 U.S. at 8.

And in *Bazemore*, the Court reiterated that it was not sufficient for a complainant to allege a discriminatory decision outside the limitations period resulting in financial damage within the limitations period. It held that a unique rule of limitations was warranted there only because petitioners were alleging that the respondents "*have not from the date of the Act forward 'made all [their] employment* ***decisions*** *in a wholly nondiscriminatory way,'*" 478 U.S. at 396 n.6 (emphasis added).

Petitioner thus has a mistaken view regarding the centrality of the *decision* and the pre-requisite, concurrent intent to the timeliness question, and this has led her to place great stock in "a wide variety of statutory and common law claims [with respect to which] recurring payments give rise to recurring causes of action under the Equal Pay Act, the Fair Labor Standards Act, the common law of contract, and a range of other analogous contexts." Pet. br. at 13. Petitioner misses the obvious difference between those schemes and Title VII: liability under those other statutory and common law schemes *does not hinge upon the defendant's intent*, and thus on the employer's *decision* to take a particular action.

The EPA, for example, imposes "a form of strict liability" on employers who pay males more than females for performing the same work. *Mickelson v. New York Life Ins. Co.*, 460 F.3d 1304, 1310 (10th Cir. 2006). "[I]n other words, the plaintiff in an EPA case need not prove that the employer acted with discriminatory intent." *Id.* (citing *Ryduchowski v. Port Auth. of N.Y. and N.J.*, 203 F.3d 135, 142 (2d Cir. 2000)). A plaintiff makes out a *prima facie case* of liability under the EPA simply by showing "that the employer pays unequal wages for equal work, as defined in the Act." *Mitchell v. Jefferson County Bd. of Educ.*, 936 F.2d 539, 547 (11th Cir. 1991) (EPA "plaintiff is not required to prove intentional discrimination").[25] For Title VII liability, that is not sufficient; there must be an effectuated *decision* to pay unequal wages, and that *decision* must be premised on unlawful bias.

III. The EEOC's Interpretation Of Supreme Court Precedent Is Not Entitled To Deference Because Parsing Cases Does Not Require Special Agency Expertise

Petitioner seeks support for her position in what she describes as the EEOC's "consistent" position on the

25. The question of intent is also not relevant to whether a plaintiff is entitled to recovery under the FLSA. Under the FLSA, intent is only relevant to questions of 1) whether an employee is entitled to double liquidated damages and 2) whether the statute of limitations should be extended from two to three years. *See* 29 U.S.C. §§ 216(b), 255, 260; *see also McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 132-33 (1988). Likewise, in an ordinary breach of contract case, the motive of the breaching party is irrelevant to a determination of damages. *See Edens v. Goodyear Tire & Rubber Co.*, 858 F.2d 198, 203 (4th Cir. 1988) (citing *Holland v. Spartanburg Herald-Journal Co.*, 166 S. Ct. 454, 465 (1932)).

application of *Bazemore* to compensation cases. Pet. br. at 32. This reliance is misplaced for two reasons.

First, the EEOC's position on this question does not depend upon an "interpretation of the statute," but rather represents the EEOC's reading of *Bazemore* and therefore is not entitled to deference. *See Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336, n.5 (2000) (affording no deference to a longstanding Justice Department practice that was based on its interpretation of a Supreme Court case). Courts "are not obliged to defer to an agency's interpretation of Supreme Court precedent under *Chevron* or any other principle." *Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc),*vacated on other grounds*, 524 U.S. 11 (1998)). "[A]gencies have no special qualifications of legitimacy in interpreting Court opinions. There is therefore no reason for courts – the supposed experts in analyzing judicial decisions – to defer to agency interpretations of the Court's opinions." *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002) (quoting *Akins*, 101 F.3d at 740)); *see also NLRB v. IBEW, Local 340*, 481 U.S. 573, 597 (1987) ("We defer to agencies . . . in their construction of their statutes, not of our opinions.") (Scalia, J., concurring).

In claiming a special rule of limitations for salary-setting cases, the EEOC has attempted to construe this Court's decisions and not the text of Title VII. The EEOC's current, revised Compliance Manual, which for the first time specifically refers to discriminatory paychecks as "repeated occurrences of the same discriminatory employment action," makes clear that the agency's "paycheck" position is based on its interpretation of *Bazemore*'s meaning in the wake of *Morgan*.[26] *See* EEOC Compliance Manual (July 21, 2005) (Revision to Threshold Issues: "The revision conforms the Manual's discussion of the continuing violation doctrine to the Supreme Court's decision in *National Railroad Passenger Corp. v. Morgan*"). When discussing paychecks, the EEOC's

26. *Compare* EEOC Compliance Manual § 2-IV.C.2.b. at 35 and n.184 (July 27, 2000) (citing to *Bazemore* and referring to Title VII pay discrimination claims as one of two types of continuing violation) *with* EEOC Compliance Manual § 2-IV.C.1.a. at 42 and n. 183 (July 21, 2005) (also citing *Bazemore*, but stating that each occurrence of Title VII pay discrimination, "such as discriminatory paychecks," is a discrete act).

Compliance Manual does not attempt to parse the language of 42 U.S.C. § 2000e-5(e)(1), *id.* at p. 42, but *does* cite directly to *Bazemore*, n. 183; *compare Burlington Northern*, 126 S.Ct. at 2413 (detailing the EEOC's interpretation of the *language* of Title VII's retaliation provision).

Tellingly, the EEOC argued below that the issue in this case is not one of statutory construction, but rather amounts to a dispute over the construction of this Court's "decision in *Bazemore v. Friday*." *See* EEOC's Br. in Support of Petition for Rehearing and Suggestions for Rehearing En Banc at 6.[27] In fact, the EEOC never *asked* the Eleventh Circuit for deference to its interpretation of *Bazemore*, nor has it asked this Court for such deference.

Second, although petitioner claims that the EEOC's position on the application of *Bazemore* has been both clear and consistent, it has been neither. Below, the agency had this to say about the law applicable to this case:

> If it were the case that a Goodyear manager made an openly discriminatory salary-setting decision back in 1979 (when Ledbetter was hired), and that all of the company's decisions affecting her salary since then were non-discriminatory, Ledbetter *could and should have challenged* that 1979 decision by filing a timely charge.

EEOC br. at 7 (emphasis added). *Amici* fully endorse this construction of the *Evans* rule, and believe that it should guide the Court in this case. Each salary-setting decision is a discrete act, is independently actionable, and every such a decision "could and should" be challenged, if at all, within the statutorily prescribed period.

The very next sentence in the EEOC's brief, however, asserts that "petitioner's failure to do so [*i.e.*, to "challenge[] that 1979 decision by filing a timely charge"] does not deprive her of her right to seek relief [for] discriminatory paychecks she received in 1997 and 1998." *Id.* at 8. These sentences are

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27. "We believe that [the Eleventh Circuit's] decision is inconsistent with decisions of the Supreme Court and of this Court. . . ." EEOC's Br. in Support of Petition for Rehearing and Suggestions for Rehearing En Banc at 3 (*www.eeoc.gov/briefs/Ledbetter.txt* (last visited 10/23/06)) (page references are based on on-line version of brief found on EEOC website).

irreconcilable, and they reflect an almost schizophrenic confusion at the EEOC over the event that triggers the Act's filing requirement.

Moreover, while the agency's Compliance Manual has construed *Bazemore* to require a special limitations rule applicable only to salary-setting decisions, the agency has also stated – in its regulation implementing Title VII's recordkeeping requirements[28] (which is entitled to judicial deference) – that employers must keep compensation records for just one year, and has explained that doing so will eliminate any "*possibility* that an employer or labor organization will have legally destroyed its employment records before being notified that a charge has been filed." 54 Fed. Reg. 6551 (Feb. 13, 1989) (emphasis added). This directive cannot be reconciled with the EEOC's articulated view that an employer can be called upon to defend salary setting-decisions made years or decades before the charge.

IV. The Distinction Between "Pay" Cases On The One Hand, And "Everything Else" On The Other, Is An Illusion

Petitioner suggests that the Court distinguish between "disparate pay claims" and all other forms of discrimination for limitations purposes. This taxonomy is deceptive and would encourage the sort of artful pleading this Court anticipated and attempted to forestall in *Evans*. 431 U.S. at 560.[29]

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28. 29 C.F.R. §1602.14.

29. These false distinctions have led to peculiar and inconsistent results as courts struggle to separate pay *qua* pay from the consequences of non-pay decisions *See, e.g., Reese v. Ice Cream Specialties, Inc.*, 347 F.3d 1007, 1013 (7th Cir. 2003) (finding a denial of raise claim filed three years after the actual denial to be timely because the case did not involve a "discrete discriminatory act such as a failure to promote."); *Tademe v. Saint Cloud State Univ.*, 328 F.3d 982 (8th Cir. 2003) (dismissing claims based on 1996 denial of tenure and 1998 discriminatory promotion, but allowing "salary discrimination" stemming from much earlier 1991 decision to proceed to summary judgment); *see also Taylor v. Northeast Ill. Reg'l R.R. Corp.*, No. 01 C 6319, 2004 WL 635058 (N.D. Ill. 2004) ("To the extent that Taylor's charge of discrimination is based on his being hired as a P8 paralegal at a lower starting salary than non-black P8 paralegals, he states a strict paycheck

(Cont'd)

Nearly every form of adverse employment action has an impact on compensation – denied promotions, demotions, transfers, reassignments, tenure decisions, suspensions and other discipline – they *all* have the potential to affect pay. Expanding the *Bazemore* exception to include any decision that impacts pay would turn the exception into the rule, and the general rule established in *Evans* and *Ricks* into a dead letter.

Presumably petitioner would agree that the pay consequences of a denied promotion would not bring a case within the special *Bazemore* exception, but if that is so it is difficult to see what in *her* case makes *Bazemore* applicable. This case is a "disparate pay dispute" only in the most derivative sense.[30] Petitioner's core complaints relate to a poor performance evaluation. That evaluation, she alleges, was prepared by her manager as retribution because petitioner refused to go on a date with him. The compensation *consequences* of that evaluation appeared in petitioner's paychecks, but only in the same way that a denied promotional opportunity would have a continuing monetary consequence for the unsuccessful candidate, and petitioner does not appear to argue that *Bazemore* would apply in that latter circumstance.[31] Thus, it is difficult to divine the rule petitioner

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(Cont'd)

claim. This means that checks received by Taylor within the 300-day limitations period which reflect [the employer's] initial decision to pay him less than non-black P8 paralegals will not be time-barred.... But, to the extent that Taylor's charge of discrimination is based on his being given a lower annual salary increase than non-black P8 paralegals, he complains of discrete acts of discrimination that are subject to the 300-day limitations period.")

30. Petitioner's term – "disparate pay claim" – is confusing. Petitioner's proposed rule would not apply to many forms of pay, such as bonuses and stock grants, that are one-time events and do not affect each paycheck. Conversely, as explained in the text, petitioner would extend the rule to cases that involve employer actions that affect employee pay only in a derivative sense.

31. Poor performance evaluations are themselves actionable when they affect grade or salary. *See Taylor v. Small*, 350 F.3d 1286, 1293 (D.C. Cir. 2003); *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 377 (4th Cir. 2004).

would use to distinguish her own "pay disparity case" – allegedly covered by *Bazemore* – from the run of the mill cases governed by *Evans*.

CONCLUSION

For the foregoing reasons, the decision of the district court dismissing petitioner's pay discrimination claim with prejudice should be affirmed.

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IN THE

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LILLY M. LEDBETTER,
Petitioner,

v.

GOODYEAR TIRE AND RUBBER COMPANY, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

No. 05-1074

LILLY M. LEDBETTER,

Petitioner,

v.

GOODYEAR TIRE AND RUBBER COMPANY, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council and the Society for Human Resource Management respectfully submit this brief as *amici curiae*.[1] Letters of consent from both parties have been filed with the Court. The brief urges this Court to affirm the decision below, and thus supports the position of the Respondent, Goodyear Tire and Rubber Company, Inc.

[1] Counsel for *amici curiae* authored the brief in its entirety. No person or entity, other than the *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 320 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Society for Human Resource Management (SHRM or the Society) is the world's largest association devoted to human resource management. Representing more than 210,000 individual members, the Society's mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources available. As an influential voice, the Society's mission is also to advance the human resource profession to ensure that HR is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters within the United States and members in more than 100 countries.

Amici's members are employers or representatives of employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, and other equal employment statutes and regulations. *Amici's* members, therefore, have a direct and ongoing interest in the issues presented in this case.

EEAC and SHRM seek to assist this Court by highlighting the impact its decision may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of this Court relevant matters that the

parties have not raised. Because of their experience in these matters, EEAC and SHRM are well situated to brief this Court on the concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Goodyear hired Lily Ledbetter as a "Supervisor," later called an "Area Manager," at its Gadsden, Alabama tire plant in 1979. Pet. App. 5a. An Area Manager is a salaried, nonunion, floor-level manager who supervises one shift of workers within a section of the plant. *Id.* at 3a.

Managerial employees' salaries are based on a system of annual merit-based raises, based on each employee's performance ranking as compared to other managers. *Id.* At the beginning of her employment, Ledbetter was paid the same salary as other male supervisors at the Gadsden plant. *Id.* at 4a, 12a. Throughout her nineteen-year career with the company, however, her performance almost always ranked at or near the bottom of Area Managers, and her merit increases were calculated accordingly. *Id.* at 5a. She last received a merit increase in 1995. *Id.* at 9a.

In late 1996, Ledbetter was slated for layoff as part of a plant-wide reduction in force, but remained employed through 1997 as a substitute for other Area Managers on long-term medical leave. *Id.* at 7a. She was not considered for a raise in 1997 because she was slated for layoff. *Id.* at 8a n.4. She received a low ranking in 1998 for her 1997 performance and again was denied a raise. *Id.* at 9a.

In March of 1998, Ledbetter filed an intake questionnaire with the Equal Employment Opportunity Commission and later a formal charge of discrimination. *Id.* Eventually, Ledbetter also brought a Title VII lawsuit, alleging that she had received a discriminatorily low salary as an Area Manager because of her sex. *Id.* at 10a. The jury ruled in favor of

Ledbetter and recommended substantial back pay and mental anguish awards plus almost $3.3 million in punitive damages, which the judge cut back to $300,000 due to the statutory cap on Title VII damages. *Id.* at 10a-11a. The trial court declined to overturn the verdict, and Goodyear appealed to the Eleventh Circuit. *Id.* at 11a.

On appeal, the Eleventh Circuit reversed the lower court's decision, holding that Ledbetter could challenge at most the pay decisions made in 1997 and 1998, and that Ledbetter had not shown that either decision was discriminatory. *Id.* at 27a-28a, 15a. In so ruling, the court relied on this Court's decision in *National Railroad Passenger Corp. (Amtrak) v. Morgan*, 536 U.S. 101 (2002), which held that a plaintiff can sue for "discrete acts" of discrimination only to the extent that they occur within the limitations period. *Id.* at 19a. Ledbetter's pay claims, the Eleventh Circuit concluded, are necessarily based on pay *decisions*, at least in cases like this where the employer conducts annual salary reviews, and those pay decisions are "discrete acts" under *Morgan*. *Id.* at 17a-18a. As long as the plaintiff received a discriminatorily low paycheck during the limitations period, the court reasoned, the plaintiff can look back as far as the most recent underlying decision—but no further. *Id.* at 24a.

Applying this analysis to Ledbetter's case, the Eleventh Circuit concluded that she had failed to prove that discrimination was the reason she was denied a raise in either 1997 or 1998. *Id.* at 30a-31a. In 1998, the two male employees who were ranked almost as low as Ledbetter, and one ranked lower, did not receive raises either. *Id.* at 31a. In 1997, Ledbetter did not receive a raise because she was about to be laid off, and there was no evidence that she was improperly selected for layoff. *Id.* at 32a-33a. Accordingly, the Eleventh Circuit reversed the lower court's judgment and ruled for Goodyear. *Id.* at 37a. Ledbetter petitioned

this Court for a writ of certiorari, which was granted on June 26, 2006.

SUMMARY OF ARGUMENT

Title VII requires an aggrieved individual to file an administrative charge of discrimination with the Equal Employment Opportunity Commission within 180 or 300 days of the allegedly discriminatory event. 42 U.S.C. § 2000e-5(e). Under this Court's decisions in *National Railroad Passenger Corp. (Amtrak) v. Morgan*, 536 U.S. 101 (2002) and *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), the statute of limitations for filing a claim of pay discrimination begins to run when a decision affecting pay is made—and does not, as Ledbetter argues, continue to run years later merely because the effects of that decision may still be felt through periodic paychecks.

Virtually all forms of employment discrimination have some consequential, and to that extent, continuing effect on their victims. But the decisions of this Court unequivocally establish that continuing effects alone do not insulate alleged acts of discrimination from the necessity for timely challenge. *Morgan*, 536 U.S. at 114; *Evans*, 431 U.S. at 557. Ledbetter's reliance on the Court's decision in *Bazemore v. Friday*, 478 U.S. 385 (1986), to argue the contrary is misplaced. Because the facially discriminatory salary structure at issue in *Bazemore* was a *present* violation of the law that could be challenged "at any time," it is distinguishable from this case, where no facially discriminatory pay structure is alleged and the challenged employment actions are discrete performance appraisals used to support merit-based pay decisions. *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 913 n.5 (1989) (*superseded on other grounds by* 42 U.S.C. § 2000e-5(e)(2)); *Bazemore*, 478 U.S. at 396 n.6.

If this Court were to permit pay discrimination plaintiffs to challenge their current pay rate at any time, regardless of

when decisions affecting their pay were made, the result would be the virtual elimination of a statute of limitations period for any employment decision that either directly or indirectly affected the person's pay. This would impose an undue burden on employers to defend stale claims long after "evidence has been lost, memories have faded, and witnesses have disappeared." *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 428 (1965) (citation omitted).

Moreover, expanding the limitations period well beyond 300 days in cases involving alleged pay discrimination will severely prejudice employers who reasonably have relied on EEOC regulations permitting employers to lawfully destroy employment records after one year, unless a charge has been filed. 29 C.F.R. § 1602.14. These employers will not have any documents to support pay decisions they made in the past, thus undermining their ability to defend a subsequent pay discrimination claim. Moreover, going forward, employers would be placed under the extraordinary burden of having to save *all* employment records forever, because they would not be able to anticipate which employment decisions would generate pay discrimination charges.

ARGUMENT

I. UNDER THIS COURT'S DECISIONS IN *MORGAN* AND *EVANS*, THE STATUTORY LIMITATIONS PERIOD ON A CLAIM OF PAY DISCRIMINATION BEGINS TO RUN WHEN A DECISION AFFECTING PAY IS MADE

A. Title VII Requires An Aggrieved Individual To File An Administrative Charge Within 180 Or 300 Days Of An Allegedly Discriminatory Discrete Event

Title VII "specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit." *Alexander v. Gardner-Denver*

Co., 415 U.S. 36, 47 (1974). One of these prerequisites is that aggrieved individuals must file an administrative charge of discrimination with the Equal Employment Opportunity Commission (EEOC) within one hundred and eighty days after the alleged discriminatory event. 42 U.S.C. § 2000e-5(e).[2] Title VII makes only one exception to this requirement. Where the aggrieved individual has filed a discrimination charge with a state or local enforcement agency with authority to grant or seek relief, he or she has "three hundred days after the alleged unlawful employment practice occurred" to file an EEOC charge. 42 U.S.C. § 2000e-5(e). No other exceptions extend the length of Title VII's limitations period.

Congress mandated that the time limitations would start with the date of the "alleged unlawful employment practice." 42 U.S.C. § 2000e-5(e); *Delaware State Coll. v. Ricks*, 449 U.S. 250, 259 (1980) (internal quotation omitted). In *National Railroad Passenger Corp. (Amtrak) v. Morgan*, 536 U.S. 101 (2002), this Court clarified that this means that a Title VII plaintiff who challenges a "discrete" discriminatory act (such as discipline, discharge, promotion, transfer, and hiring), first must file an EEOC charge within 180 or 300 days of when the act "occurred"—or, as *Morgan* instructs, on the day that it "happened."[3] *Id.* at 110, 113.

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[2] The second prerequisite is that an individual must file suit within ninety days of receiving a notice of the right to sue from the EEOC. 42 U.S.C. § 2000e-5(f).

[3] *Morgan* distinguished hostile work environment claims from claims involving "discrete" acts, explaining that a hostile work environment generally involves repeated conduct that occurs over a period of time—perhaps even years. *Morgan* at 115. While a single act may not be sufficient to support a claim of hostile environment discrimination under Title VII, the Court said, the cumulative total may. *Id.* Therefore, this Court interpreted Title VII as giving individuals 180 or 300 days from *any* act that forms part of the hostile environment claim to file an EEOC charge of harassment. *Id.* at 117-18.

Moreover, over the years this Court repeatedly has refused to sanction arguments in favor of lengthening the limitations period for discrete acts in certain cases beyond 180/300 days. Most recently, for example, *Morgan* rejected the notion that a series of discrete acts could work together to constitute a single unlawful employment practice, noting that discrete acts are "easy to identify" and "are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Id.* at 113-14. Morgan had challenged as discriminatory several disciplinary actions, including written and verbal counselings and suspensions from work without pay, as well as the denial of training opportunities and his eventual termination. The Court refused to allow Morgan to combine events that occurred outside Title VII's limitations period with more recent events as a "continuing violation," ruling that any alleged discrete acts of discrimination falling outside of the applicable filing period were dead for purposes of bringing a valid Title VII claim, although they could be used "as background evidence in support of [the] timely claim." *Id.* at 113.

Prior to *Morgan*, this Court held in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), that the present "effects" of past discriminatory acts also are not actionable under Title VII and that the law instead requires a plaintiff to show a "present *violation*" of the law within the limitations period. *Id.* at 558. In *Evans*, the plaintiff was forced to resign her position as a flight attendant for violating a "'no marriage' rule" that later was found to be discriminatory. *Id.* at 555. When she was rehired four years later (after the company had abandoned the "no marriage" rule), her seniority date did not reflect her earlier employment because company policy counted only continuous time-in-service, which resulted in less pay and benefits. *Id.* The plaintiff had not filed a timely administrative charge over her resignation, but tried to revive the claim after her rehire by alleging that the company's seniority system gave "present effect to the past illegal act and

therefore perpetuate[d] the consequences of forbidden discrimination." *Id.* at 557.

This Court rejected Evans' claim as untimely even though the discharge decision continued to have an effect on her pay and benefits. *Id.* at 558. According to the ruling, "emphasis should not be placed on mere continuity," but rather on "whether any present *violation* exists." *Id.* There was no present violation, this Court explained, because "[a] discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed." *Id.* In other words, it is "merely an unfortunate event in history which has no present legal consequences." *Id.*

Likewise, *Delaware State College v. Ricks*, 449 U.S. 250 (1980), held that the college's decision to deny tenure was the discriminatory act that marked the beginning of the limitations period, even though the plaintiff did not feel the effects of the decision until his termination. Again, the *Ricks* Court reminded litigants that "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." *Id.* at 257 (citing *Evans*).

Accordingly, the law is well settled that a Title VII plaintiff must challenge a discriminatory discrete event within the 180/300 day time frame established by Congress.

B. Employment Decisions That Affect A Person's Pay Are Discrete Events And Must Be Challenged Within The 180/300-Day Time Frame

To date, this Court has not treated decisions that affect a person's pay any differently than decisions that do not for the purpose of ascertaining the timeliness of a claim. For example, the Court permitted Morgan to challenge a decision to deny him training opportunities (which presumably had—or could have—effected his pay), but only because the

decision occurred within the statute of limitations period. *Morgan* at 114. On the other hand, because Evans had been discharged pursuant to a discriminatory policy outside the limitations period, she could not challenge her discharge, even though it had a continuing effect on her pay within the limitations period. *Evans* at 557.

Ledbetter's case falls squarely within this line of cases. In her complaint, Ledbetter challenges discrete acts—annual performance evaluations—that directly effected her eligibility for pay raises. Pet. for Writ of Cert. at 4 ("This pay differential was accomplished through discriminatory annual evaluations and pay raises"). Goodyear determined the salaries of Area Managers using a system of annual merit-based raises, with any award determined by the employee's performance in relation to other employees. Ledbetter's challenge focuses on these evaluations, which she claims did not "accurately reflect the true quality of her work" or were deliberately "falsified" and, therefore, resulted in her receiving less pay. Pet. Brief at 5.

Under *Morgan*, each of these performance evaluations constitutes a separate "discrete act" that triggers the statute of limitations period. *Miller v. New Hampshire Dep't of Corrs.*, 296 F.3d 18, 22 (1st Cir. 2002) (allegedly discriminatory transfer, letter of warning, and performance evaluation were discrete acts and, therefore, time-barred). Although some courts have said the limitations period for challenging an adverse performance evaluation will not run unless some tangible, adverse consequence results from it (such as discipline, discharge or loss of pay), a Title VII plaintiff still must file a timely charge *at least as soon* as the implications of the evaluation have crystallized. As the Court of Appeals for the First Circuit explained in *Thomas v. Eastman Kodak Co.*, 183 F.3d 38 (1st Cir. 1999):

> [E]mployees do not have an unfettered right to reach back to challenge previous evaluations. The key is

> whether those evaluations had tangible, concrete effects at the time they were conducted. If the evaluation did cause tangible, concrete harm, the notice standard requires the injured employee to promptly bring suit to recover for those harms. Failure to do so will render any later claim regarding those particular harms time-barred. If, for example, a poor job evaluation resulted in a denial of a salary increase, notice of the denial would mark the accrual point for a pay inequity claim.

Id. at 50 and n.8.

In this case, Ledbetter felt the "tangible, concrete effects" of her performance evaluations each time an evaluation resulted in the award of a less-than-desired salary increase, which would have occurred within the same performance year. Once Ledbetter became aware of this "tangible, concrete harm," she should have promptly (within 180 days) filed a charge with the EEOC. Ledbetter failed to do this, instead choosing to wait until the end of her nineteen-year career with the company to debate the validity of those evaluations and the effects on her pay.

Because Ledbetter elected not to file a timely administrative charge challenging her performance evaluations (other than the last one), she has forfeited the right to challenge those earlier evaluations, even if they had continuing effects on her pay over the course of her career. *Evans* at 558.

C. Because The Facially Discriminatory Salary Structure At Issue In *Bazemore* Was A "Present Violation" Of The Law That Could Be Challenged "At Any Time," It Is Distinguishable From This Case

Ledbetter attempts to circumvent this Court's jurisprudence by arguing that cases involving discriminatory pay are fundamentally different from cases involving other types of

discrete employment actions (like demotion or discharge) for the purpose of determining timeliness. In a disparate pay case, Ledbetter contends, the "unlawful employment practice" at issue is not the *decision* to pay someone less, but the actual *payment* of a discriminatorily depressed wage, even if the pay disparity arose from decisions made outside the limitations period. Pet. Brief at 22-23 ("Title VII prohibits discrimination 'with respect to . . . compensation'" [and] not "with respect to 'compensation *decisions*.'") (citation omitted). To support her position, Ledbetter removes from context this Court's statement in *Bazemore v. Friday*, 478 U.S. 385 (1986), that "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII." *Id.* at 395. From this she concludes that "in a disparate pay case, each discriminatory paycheck constitutes an independent unlawful employment practice in violation of Title VII, even if it simply implements a discriminatory pay decision made outside the limitations period." Pet. Brief at 16.

Ledbetter's reliance on *Bazemore* is misplaced. In *Bazemore*, the employer instituted racially segregated work facilities prior to Title VII's passage, in which black employees were paid less than whites under a facially discriminatory pay structure. *Bazemore*, 478 U.S. at 394. Although the employer merged the facilities in 1965, and adjusted the pay of black employees, pre-Act salary disparities were not fully corrected. *Id.* at 395. The Fourth Circuit had ruled that because the pay structure was initiated pre-Act, discriminatory differences in pay did not have to be eliminated post-Act, and this Court reversed. *Id.*

The *Bazemore* case, unlike this one, however, was a "pattern or practice" claim involving the continued application of a *facially* discriminatory salary structure. The fact that the employer instituted the pay structure pre-Act did not insulate it from liability post-Act, this Court said, because by

continuing to use a pay structure that admittedly paid employees differently on the basis of race, it had engaged in a *present* violation of Title VII. *Id.* Accordingly, as the Court later explained in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989) (*superseded on other grounds by* 42 U.S.C. § 2000e-5(e)(2)), "[e]ach week's paycheck [that] deliver[ed] less to a black than to a similarly situated white" was actionable in *Bazemore* because a facially discriminatory system "discriminates each time it is applied." *Id.* at 913 n.5 (citations and internal quotations omitted). Therefore, it can be challenged "at any time." *Id.* at 913. Indeed, the *Bazemore* Court was careful to note, consistent with *Evans*, that it was "in no sense giv[ing] legal effect to pre-[Act] actions," or acts otherwise not actionable, but instead was "focuse[d] on the present salary structure." *Id.* at 396 n.6.

In Ledbetter's case, there is no facially discriminatory salary structure. Nor does she allege that one exists. Rather, Ledbetter disputes the accuracy of discrete performance evaluations conducted by different supervisors over a period of almost two decades and consequentially the effects they had on her pay. *Bazemore* is simply inapposite.

Furthermore, Ledbetter's unique limitations theory is contrary to the law of *Evans*. Virtually all forms of employment discrimination have some consequential, and to that extent, continuing effects on their victims. Indeed, were Ledbetter's claims proved, she might well be able to show her appraisals (and resultant pay) have had consequences to her career extending for years—and possibly even beyond her employment with Goodyear. But the teaching of this Court's decision in *Evans* unequivocally establishes that continuing effects alone do not insulate alleged acts of discrimination from the necessity for timely challenge. By measuring the 180-day time limit from the date of the alleged discriminatory act, all Title VII plaintiffs are placed on an equal footing.

Ledbetter's misapplication of *Bazemore* should be rejected.

II. A POLICY THAT PERMITS DISCRIMINATION PLAINTIFFS TO CHALLENGE CURRENT PAY, AS OPPOSED TO DECISIONS AFFECTING PAY, WILL EFFECTIVELY ELIMINATE THE LIMITATIONS PERIOD FOR ALL PAY-RELATED DECISIONS—IMPOSING AN UNDUE BURDEN ON EMPLOYERS TO DEFEND AGAINST STALE CLAIMS

A. Allowing Pay Discrimination Plaintiffs To Challenge Current Pay At Any Time, Without Regard To When Decisions Affecting Their Pay Were Made, Would Effectively Result In The Elimination Of A Limitations Period For Any Pay-Influencing Employment Decision

Inherent in Ledbetter's misconstruction of Title VII's time limitation is a perpetuation theory wholly at odds with the Title VII policy that favors limiting the life of claims. Congress deliberately restricted the rights of individuals to raise Title VII claims when it set the length of the limitations period. In a related context, this Court cautioned against disregarding this restriction:

> By choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination . . . [I]n a statutory scheme in which Congress carefully prescribed a series of deadlines measured by numbers of days—rather than months or years—we may not simply interject an additional . . . period into the procedural scheme. We must respect the compromise embodied in the words chosen by Congress. It is not our place simply to alter the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction.

Mohasco Corp. v. Silver, 447 U.S. 807, 825-26 (1980) (footnote omitted); *see also International Union of Elec. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 240 (1976)

("Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a 'slight' delay followed by 90 days equally acceptable. In defining Title VII's jurisdictional prerequisites 'with precision,' Congress did not leave to courts the decision as to which delays might or might not be 'slight'") (citation omitted).[4]

This Court concluded in *Mohasco* that in choosing the length of Title VII's limitations period, Congress intentionally risked leaving some victims of discrimination without a remedy in order to further its goal of precluding stale claims, stating: "[I]t seems clear that the [limitations] provision to some must have represented a judgment that most genuine claims of discrimination would be promptly asserted and that the costs associated with processing and defending stale or dormant claims outweigh the federal interest in guaranteeing a remedy to every victim of discrimination." 447 U.S. at 820. In light of Congress's decision, this Court advised: "[I]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Id.* at 826.

Yet if this Court holds, as Ledbetter asks, that pay discrimination plaintiffs may challenge their current pay rate at any time, regardless of when decisions affecting their pay were made, the result will be the virtual elimination of a statute of limitations period for any employment decision that either directly or indirectly affected the person's pay. According to Ledbetter's logic, for example, an employee would be able to reach back well beyond the statutory 180/300 day limitations period to challenge the denial of a

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[4] The 1972 amendments to Title VII enlarged the limitations period to 180 days. (codified as amended at 42 U.S.C. § 2000e-5(e)).

training opportunity or more challenging work assignments if, as a result of the denial, the employee received a smaller pay increase that year. Likewise, an employee could do as Ledbetter has done and wait almost two *decades* to challenge a performance appraisal that formed the basis of a merit-based raise decision.

Even if the employee believed the pay-influencing employment action was discriminatory at the time it occurred (as Ledbetter did at the time she received her appraisals), she could remain silent without sacrificing her claims. The employer would not have any inkling during the employee's career of the perception of discrimination, but it still would have to defend each employment action many years after it occurred. In other words, the mere issuance of a paycheck would "open[] the door for a full inquiry into the motivations of every person who ever made a decision contributing to the [employee's] pay level." Pet. App. 22a.

B. Exempting Pay Discrimination Plaintiffs From The Congressionally-Mandated Statute Of Limitations Period Would Impose An Undue Burden On Employers To Defend Against Stale Claims

Employers must be permitted to operate without the constant pressure that flows from the uncertainty over whether they will have to defend past employment decisions against challenges in the distant future. The purpose of statutes of limitations is to avoid precisely the prejudice to employers that results from defending stale claims. Indeed, they are "designed to assure fairness to defendants" and to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 428 (1965) (citation omitted). The interest of an individual

who fails to undertake the "minimal" step of filing a charge to preserve his Title VII claim must, therefore, give way to the interest of avoiding stale claims. *See Ricks*, 449 U.S. at 256-57 ("[t]he limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past") (citations omitted); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975) ("the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones").

Even the EEOC recognized the right of employers to some measure of finality when it set the retention period for employers to keep certain personnel and employment records under Title VII at one year from the date the record is made or the personnel action involved occurs, whichever is later, unless a charge has been filed. 29 C.F.R. § 1602.14. The one-year retention period means employers will not destroy relevant documents as part of routine file maintenance before an individual has had the opportunity to file a charge of discrimination with the EEOC. Because Title VII gives some aggrieved individuals up to 300 days from the date of the allegedly discriminatory event to file such a charge, an employer will know whether a particular employment action is the subject of a charge before it destroys any relevant documents.

Expanding the limitations period well beyond 300 days in cases involving alleged pay discrimination, as Ledbetter essentially asks this court to do, will severely prejudice employers who reasonably have relied on the regulation lawfully to destroy relevant documents. The employer will not have any documents to support pay decisions it took more than one year ago, which will hamper drastically its ability to

defend itself against a subsequent pay discrimination claim. Moreover, going forward, such a ruling would effectively require employers to save *all* employment records forever, because they would not be able to anticipate which employment decisions would generate pay discrimination charges or when. This response, however, places an undue burden on the employer and is one the EEOC expressly rejected by limiting Title VII's recordkeeping requirements to one year, unless a charge has been filed.

This Court should reject Ledbetter's plea to unravel the very important protection Title VII's statute of limitations affords employers against stale claims.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE ASIAN AMERICAN JUSTICE CENTER, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AARP AND THE LEGAL AID SOCIETY - EMPLOYMENT LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The National Employment Lawyers Association, the Lawyers' Committee for Civil Rights Under Law, the Asian American Justice Center, the National Association for the Advancement of Colored People, AARP and The Legal Aid Society – Employment Law Center respectfully submit this brief as *amici curiae* in support of Petitioner pursuant to Supreme Court Rule 37.3(a), upon the consent of the parties.

Amici are interested in furthering the goal of Title VII of the Civil Rights Act of 1964 to eradicate employment discrimination. In this case, *Amici* seek to ensure that longstanding interpretations of the civil rights laws are not upended, and that workers will have a fair opportunity to protect their right to equal pay for each day of equal work during the limitations period. In an effort to assist the Court in its interpretation of the laws aimed at eliminating unlawful employment discrimination, *Amici* have filed *amicus* briefs in Title VH cases including *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 1671 (2006); *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004); *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

Fuller statements of interest for all *amici* are included in the appendix to this brief.

---

[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. Counsel for *amici curiae* certify that this brief was not written, in whole or in part, by counsel for a party, and that no person or entity, other than *amici curiae* and counsel, made a monetary contribution to the preparation or submission of the brief. Supreme Court Rule 37.6.

SUMMARY OF ARGUMENT

Amici ask the Court to reaffirm longstanding precedent that in a pay discrimination case, each discriminatory paycheck is a discrete actionable wrong, regardless of when the discriminatory wage was set. This standard, articulated expressly in *Bazemore v. Friday*, 478 U.S. 385 (1986), is in harmony with the plain language of Title VII, has consistently been applied by lower courts, the Equal Employment Opportunity Commission, and other federal enforcement agencies, and makes practical sense. This standard, as evidenced by two decades of consistent application, is faithful to Title VII's careful balance between providing redress to victims of pay discrimination and protecting employers from excessive back pay or stale claims.

The Eleventh Circuit's holding would make it impossible for an employee to challenge current and ongoing discrimination in pay. This interpretation is directly contrary to Supreme Court precedent set out in *Bazemore*. *Bazemore* has been applied consistently and visibly since 1986. In 1991, Congress passed the Civil Rights Act of 1991, which abrogated several Supreme Court interpretations of Title VII. Despite these significant changes, Congress made no changes that would undermine *Bazemore*, but rather endorsed that case's interpretation of Title VII.

Further, the Equal Employment Opportunity Commission ("EEOC"), the federal agency charged with enforcing Title VII, has issued and reaffirmed guidance that every paycheck issued constitutes a discrete act by the employer. Because the EEOC's interpretation is reasonable and consistent with statutory language, legislative intent, and past decisions of this Court, it deserves deference. Finally, this rule is consistent with parallel interpretations of the Equal Pay Act, the National Labor Relations Act, and the Fair Labor Standards Act.

Title VII was passed to provide robust protection for victims of discrimination. Congress balanced this interest with protections for employers, for example, a two-year limitation on any award of back pay. The Court, the EEOC, and Congress have all recognized that the rule set forth in *Bazemore* is the correct interpretation of that balance, and the Court should continue to affirm that rule today.

ARGUMENT

I. EACH PAYCHECK THAT COMPENSATES A CHARGING PARTY LESS THAN SIMILARLY SITUATED EMPLOYEES BECAUSE OF SEX VIOLATES THE PLAIN LANGUAGE OF SECTION 706(e) OF TITLE VII AND ESTABLISHED PRECEDENT OF THIS COURT.

Two decades ago, in unequivocal language, this Court ruled that "[e]ach week's paycheck that delivers less to a black than a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." *Bazemore v. Friday*, 478 U.S. 385, 395-96 (1986) (Brennan, J., concurring).[2] This holding honors the plain language of Title VII, makes practical sense, and has been consistently applied by the courts and federal enforcement agencies. The ruling below contravenes *Bazemore* and the plain language of Title VII. If upheld, the Eleventh Circuit's ruling would render obsolete longstanding and consistently applied precedent of this Court and virtually every lower court in the country. It also ignores Congress' ratification of this Court's longstanding interpretation of the provision of Title VII that governs the timeliness of pay discrimination

[2] *Bazemore* was decided with a *per curiam* opinion, and Justice Brennan's concurrence was joined by all Members of the Court. *Bazemore*, 478 U.S. at 388.

charges. Finally, the ruling below is inconsistent with the EEOC's interpretation of Title VII, to which deference is ordinarily accorded.

A. Title VII Authorizes Petitioner to Challenge Disparities in Each Paycheck Received During the Time Period Covered by Her Charge.

The "most salient source for guidance" in interpreting § 706(e) of Title VII "is the statutory text." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002). In establishing the time limit for filing charges, Title VII states:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . .

42 U.S.C. § 2000e-5(e)(1). *Morgan* addressed the "critical questions" of: (a) "[w]hat constitutes an 'unlawful employment practice'" and, (b) when that practice "occurs." *Morgan*, 536 U.S. at 110. Without elaboration, the Court held that a practice has "occurred" on the day that it "happened." *Id.* Addressing the very issue now before this Court, *Morgan* explained that "unlawful employment practice" referred to discrete incidents and, invoking *Bazemore*, reiterated that each paycheck is a "discrete" incident in a pay discrimination claim. *Id.* at 111-12, *quoting Bazemore*, 478 U.S. at 395-96. Further, the *Morgan* Court ruled that "[t]he existence of past acts and the employee's prior knowledge of their occurrence . . . does not bar employees from filing charges about related discrete acts . . . ." *Id.* at 113. Therefore, starting with a purely textual analysis, *Morgan* reached the same conclusion as *Bazemore* had 20 years before, and embraced the same analysis that *Bazemore* had adopted. Finally, *Morgan* held that the issuance of discriminatory paychecks prior to the limitations period does not bar a recipient of

subsequent, related paychecks from challenging them as discriminatory during the limitations period.[3] *Id.*

The facts of this case closely parallel those of *Bazemore*, and the arguments squarely rejected by the Court in *Bazemore* closely parallel the rationale employed by the Eleventh Circuit below. In *Bazemore*, a pay disparity arose prior to the enactment of Title VII. *Id.* at 393 n.4, 394-95. Even prior to 1972, when Title VII was first applicable to state employers, the employer began reducing the disparities in pay between African American and Caucasian employees. However, as of 1972 and continuing thereafter, African American employees were still, on average, paid less than similarly situated Caucasian employees. *Id.* at 394-95. The disparities in pay *before* 1972 did not constitute a violation of Title VII. *Id.* at 394. Similarly, the pay disparity here began prior to the limitations period applicable to Petitioner's Title VII charge and continued thereafter. *Ledbetter v. Goodyear Tire & Rubber Co.*, 421 F.3d 1169, 1180-81 (11th Cir. 2005). Such disparities in pay, which are "not made the basis for a timely charge" are "the legal equivalent of a discriminatory act which occurred before the statute was passed." *United Airlines v. Evans*, 431 U.S. 553, 558 (1977). Thus, the pay disparities that Petitioner experienced at Goodyear prior to 1997 are the legal equivalent of the pay disparities that the *Bazemore* plaintiffs experienced prior to 1972. *Id.*

---

[3] The issue before the Eleventh Circuit is more properly characterized as a question of the period within which damages may be recovered rather than the period within which a charge may be filed. Under *Bazemore*, and the language of Title VII, Petitioner's claim was timely filed, and the real issue presented is whether her recovery is limited to the unequal pay received during the 180 day period within which charges may be filed, specified by 42 U.S.C. § 2000e-5(e)(1), the two year period within which back pay may be recovered, pursuant to 42 U.S.C. § 2000e-5(g)(1), or is governed by some other time period. But these are not the issues currently before the Court.

The Fourth Circuit in *Bazemore* ruled that the pay differences, which were indisputably *created* prior to 1965, could not be challenged in 1972, because the decision to pay African American employees less than Caucasians had been made when Title VII did not apply to that employer. Accordingly, the Fourth Circuit held that the African American employees could not challenge the entire salary disparity, but could only challenge the pay-raise decisions made during the time that Title VII applied to them. Finally, the Fourth Circuit held that the pay-raise decisions made after 1972 were not discriminatory. *Id.* at 394-95.

Similarly, the Eleventh Circuit ruled here that only the decisions that originated the pay disparity could be challenged, and, as they occurred before the limitations period applicable to the Petitioner's charge, they were beyond challenge. Accordingly, the Eleventh Circuit reasoned, any challenge to pay disparities occurring within the limitations period was untimely as the disparities originated with decisions made prior to the limitations period. *Ledbetter*, 421 F.3d at 1179-81. Employing an analysis strikingly similar to the reasoning applied by the Fourth Circuit in *Bazemore*, the Eleventh Circuit ruled that Petitioner could not challenge "every dollar of difference between her salary and her male co-worker's salaries." *Id.* at 1181. Instead, the Petitioner was limited to challenging pay-raise decisions made during or immediately before the limitations period. *Id.* at 1180, 1182-83. Having limited the scope of the Petitioner's claim, the Eleventh Circuit held there was insufficient evidence of pay discrimination within the limitations period to support the verdict for Petitioner. *Id.* at 1186-87.

The Court's decision in *Bazemore* rejected each of the Fourth Circuit's rulings and the same analysis compels reversal of the Eleventh Circuit here. As this Court explained in *Bazemore*:

> The error of the Court of Appeals with respect to salary disparities created prior to 1972 and perpetuated thereafter is too obvious to warrant extended discussion: that the Extension Service discriminated with respect to salaries *prior* to the time it was covered by Title VII does not excuse perpetuating that discrimination *after* the Extension Service became covered by Title VII.
>
> . . .
>
> Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII.

Bazemore, 478 U.S. at 395-96. The Court ruled that the employer "was under an obligation to eradicate salary disparities based on race that began prior to the effective date of Title VII," and thus it was error to consider only the pay-raise decisions made after the effective date of Title VII in assessing liability, instead of the total disparity in salary. *Id.* at 397.

The Eleventh Circuit's myopic focus on pay-raise activity during the time period covered by Petitioner's charge cannot be reconciled with *Bazemore*'s decision that it is error to limit the ambit of a pay claim to pay raises within the limitations period, rather than reviewing the entire salary disparity, in assessing liability. *Compare Ledbetter*, 421 F.3d at 1180-81, 1186-87 *with Bazemore* at 395-97. Fundamentally inconsistent with the holding in *Bazemore*, the decision below should be reversed.

The Eleventh Circuit mistakenly regards the pay disparity that originated before the limitations period as immune from challenge when the disparity continues into the limitations period simply because the initial decision creating the disparity occurred outside the range of liability. Indeed, the Eleventh Circuit faulted the district court for permitting Petitioner to challenge "every dollar of difference between her salary and her male co-workers'

salaries." *Ledbetter*, 421 F.3d at 1181. Notwithstanding that the pay disparities, which originated before the limitations period, continued into the limitations period with the issuance of each paycheck, the Eleventh Circuit limited the assessment of liability and measure of losses to the pay raises that occurred within the limitations period. This decision conflicts with *Morgan*'s holding that a failure to file a charge challenging earlier discriminatory actions is no bar to filing a charge challenging timely, related actions. *Morgan*, 536 U.S. at 113. Title VII makes it unlawful for Respondent "to discriminate against any individual with respect to his compensation," not merely with respect to "changes in compensation." § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1). Therefore, each paycheck Petitioner received should be examined in its entirety – not merely that portion of the paycheck that was changed by the employer during the limitations period.[4]

---

[4] Notwithstanding the Respondent's reference to *Lorance v. AT&T*, 490 U.S. 900 (1989) in its opposition to the petition for certiorari, *Lorance* does not alter the calculus prescribed by *Bazemore* and *Morgan*. *Lorance* addresses a different issue than *Bazemore* and one not before the Court here. In *Lorance*, the plaintiffs alleged that a *bona fide* seniority system was conceived with a discriminatory purpose, but did "not allege that the seniority system treats similarly situated employees differently." *Lorance*, 490 U.S. at 905. As such, the only act susceptible to challenge as intentionally discriminatory was the conception of the seniority system. Here, however, Petitioner alleges that Goodyear has treated her differently from similarly situated men each time it issues her paycheck. Had the seniority system been facially discriminatory, that is, had it treated "similarly situated employees differently" *Lorance* would have permitted its challenge at any time. *Id.* at 912. Therefore, *Lorance* would treat Petitioner's claim as timely, because she is challenging a system in which she is regularly treated differently than similarly situated men. The courts of appeal have interpreted *Lorance* in the same manner. *See Anderson v. Zubieta*, 180 F.3d 329, 336 (D.C. Cir. 1999); *Cardenas v. Massey*, 269 F.3d 251, 257 (3d Cir. 2001).

B. The Courts of Appeal Have Uniformly Held That Each Paycheck Is a New Violation of Title VII and Congress Ratified This Rule in the Civil Rights Act of 1991.

Until the Eleventh Circuit's decision below, every circuit court interpreted *Bazemore* to bar disparities in pay within the applicable limitations period, regardless of when the disparity originated. Moreover, this ruling has been consistently held to apply to cases involving individual claims, rather than pattern-or-practice cases, and to cases in which pay disparities arose prior to the statute of limitations, rather than prior to the application of Title VII. *See, e.g., Cardenas v. Massey*, 269 F.3d 251, 257-58 (3d Cir. 2001) (applying *Bazemore* in individual case where pay disparity arose prior to statute of limitations); *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 345-48 (4th Cir. 1994) (same); *Wagner v. NutraSweet Co.*, 95 F.3d 527, 534 (7th Cir. 1996) (applying *Bazemore* in case where pay disparity arose prior to when a release of claims was executed, but continued thereafter); *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 168 (8th Cir. 1995) (en banc) (applying *Bazemore* in individual case where pay disparity arose prior to statute of limitations); *Goodwin v. Gen. Motors Corp.*, 275 F.3d 1005, 1009-10 (10th Cir. 2002) (same); *Calloway v. Partners Nat'l Health Plans*, 986 F.2d 446, 448-49 (11th Cir. 1993) (same); *Anderson v. Zubieta*, 180 F.3d 329, 335-36 (D.C. Cir. 1999).

Bazemore's ruling, that each paycheck may give rise to a new act of discrimination, was also ratified by Congress. Five years after *Bazemore* was decided and cited repeatedly by the lower courts, Congress passed the Civil Rights Act of 1991. Pub. L. No. 102-166, 105 Stat. 1071 (1991). This act, *inter alia*, amended Title VII to abrogate several rulings of the Court that Congress concluded had misinterpreted various provisions of Title VII. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 250-51 (1994), *citing* Pub. L. No. 102-166, § 3(4), 105 Stat. 1071. Although the legislation made numerous changes to Title VII, including

changes to when seniority systems could be timely challenged, *see* 42 U.S.C. § 2000e-5(e)(2), Congress declined to disturb or modify the holding in *Bazemore*. Pub. L. No. 102-166, 105 Stat. 1071. Indeed, legislative history demonstrates that in predecessor bills to the Civil Rights Act of 1991, Congress expressly endorsed the holding in *Bazemore*. S. Rep. No. 101-315, text at nn.44-45, 1990 WL 259315 (1990) (referencing "the result correctly reached in *Bazemore*"); 136 Cong. Rec. S15376-01, S15381 (1990) (confirming that a new provision would not affect the precedent set in *Bazemore*); H.R. Rep. No. 101-644(II), at n.41 (1990); H.R. Rep. No. 102-40(I), at 62 & n.58 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 549; H.R. Rep. No. 102-40(II), at 23, 24 & n.39 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 549.

Where Congress has been aware of the Court's interpretation of a statute, has had the opportunity to amend the statute to achieve a different result, and has chosen not to do so, this Court has concluded that Congress has endorsed the interpretation, and it should be respected as the view of the legislature. As the Court held in *Faragher*:

> We are bound to honor *Meritor* [*Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986)] on this point not merely because of the high value placed on *stare decisis* in statutory interpretation, *supra*, at 2286, but for a further reason as well. With the amendments enacted by the Civil Rights Act of 1991, Congress both expanded the monetary relief available under Title VII to include compensatory and punitive damages, see § 102, 105 Stat. 1072, 42 U.S.C. § 1981a, and modified the statutory grounds of several of our decisions, see § 101 *et seq*. The decision of Congress to leave *Meritor* intact is conspicuous. We thus have to assume that in expanding employers' potential liability under Title VII, Congress relied on our statements in *Meritor* about the limits of employer liability. To disregard those statements now (even if we were convinced of reasons for doing so)

> would be not only to disregard *stare decisis* in statutory interpretation, but to substitute our revised judgment about the proper allocation of the costs of harassment for Congress's considered decision on the subject.

Faragher v. Boca Raton, 524 U.S. 775, 804 n.4 (1998); *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 118 (2002) ("By amending the law without repudiating the regulation, Congress 'suggests its consent to the Commission's practice.'") (*quoting EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981)). In light of the other changes made by Congress in enacting the Civil Rights Act of 1991, "the decision to leave" the holding of *Bazemore* "intact is conspicuous," and the Court should not alter its interpretation here. *Faragher*, 524 U.S. at 804 n.4.

Moreover, the circuit courts, other than the Eleventh Circuit below, have consistently held that *Morgan* preserved the holding in *Bazemore*: that disparities in pay received within the limitations period may be challenged in their entirety, regardless of when they originated. *See, e.g., Elmenayer v. ABF Freight Sys., Inc.*, 318 F.3d 130, 134 (2d Cir. 2003); *Forsyth v. Fed'n Employment & Guidance Serv.*, 409 F.3d 565, 572-73 (2d Cir. 2005); *Williams v. Giant Food, Inc.*, 370 F.3d 423, 429 (4th Cir. 2004); *Reese v. Ice Cream Specialties, Inc.*, 347 F.3d 1007, 1009 (7th Cir. 2003); *Hildebrandt v. Ill. Dep't of Natural Res.*, 347 F.3d 1014, 1027 (7th Cir. 2003); *Tademe v. Saint Cloud State Univ.*, 328 F.3d 982, 989 (8th Cir. 2003); *Lyons v. Eng.*, 307 F.3d 1092, 1107 n.7 (9th Cir. 2002); *Davidson v. Am. Online, Inc.*, 337 F.3d 1179, 1186 (10th Cir. 2003); *Shea v. Rice*, 409 F.3d 448 (D.C. Cir. 2005).

C. The EEOC's Interpretation of § 706 – That Each Paycheck Constitutes a Discrete Act – is Fully Consistent With the Language of Title VII, Is Reasonable and Consistent With Legislative Intent, and Warrants This Court's Deference.

EEOC guidance constitutes a body of experience and informed judgment to which courts and litigants may properly resort for direction. *See, e.g., Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2413-14 (2006); *Smith v. City of Jackson*, 544 U.S. 228, 235 (2005); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971). Courts rely on the EEOC's interpretations to inform their understanding of Title VII and other employment discrimination laws. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986). Indeed, in the Court's most recent decision in a Title VII case, the Court relied in part on sub-regulatory guidance issued by the EEOC. *See Burlington N.*, 126 S. Ct. at 2413-14 (*citing* with approval the EEOC's interpretation of Title VII's anti-retaliation provision, as stated in the EEOC Compliance Manual). Consistent with long-standing judicial interpretation, the EEOC has promulgated well-reasoned guidance that each paycheck constitutes a discrete act susceptible to challenge under Title VII. This interpretation should be adopted because it has the "power to persuade" as described in *Skidmore*, when one considers "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all th[e other] factors which give it power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Gonzales v. Oregon*, 126 S. Ct. 904, 922 (2006). Relying upon close examination of *Bazemore* and *Morgan*, as well as the plain language and purpose of Title VII's prohibition of discrimination in pay, the EEOC's well-reasoned interpretation is entitled to deference.

As new authority is issued by the courts, the EEOC's policy guidance on *Bazemore* has been reissued, demonstrating that it has accounted for the latest jurisprudence on the subject. Before the *Morgan* decision, EEOC guidance referred to *Bazemore*'s holding that each paycheck constitutes "a wrong actionable under Title VII." EEOC Compliance Manual, "Threshold Issues: Timeliness" § 2-IV.C at n.183 (issued July 27, 2000) (citations omitted).

After *Morgan*, the EEOC promulgated new guidance which concluded that the principles enunciated in *Bazemore* still apply and, therefore, each paycheck may constitute a discrete act of discrimination. In 2005, the EEOC issued an update to its Compliance Manual to "conform[] the . . . discussion of the continuing violation doctrine to the Supreme Court's decision in . . . *Morgan*." *See* EEOC Compliance Manual Discussion, New Manual: Section 2: Threshold Issues (May 12, 2000) *available at* http://www.eeoc.gov/policy/compliance.html. The revised language provides:

> In *National Railroad Passenger Corp. v. Morgan*, the Supreme Court ruled that the timeliness of a charge depends upon whether it involves a discrete act or a hostile work environment claim. . . . A discrete act, such as failure to hire or promote, termination, or denial of transfer, is independently actionable if it is the subject of a timely charge. Such acts must be challenged within 180/300 days of the date that the charging party received unequivocal written or oral notification of the action, regardless of the action's effective date. . . . *Repeated occurrences of the same discriminatory employment action, such as discriminatory paychecks, can be challenged as long as one discriminatory act occurred within the charge filing period. See Bazemore v. Friday*, 478 U.S. 385, 395-96 (Brennan, J., concurring).

EEOC Compliance Manual, "Threshold Issues: Timeliness" § 2-IV.C (issued July 21, 2005) (citations and footnotes omitted) (emphasis added).

Consistent with this interpretive guidance, the EEOC filed an *amicus* brief with the Eleventh Circuit below. There, the EEOC argued that the principles enunciated in *Bazemore* still apply after *Morgan*:

> What *Bazemore* teaches is that Ledbetter need not prove that Goodyear made a conscious decision to discriminate against her on the basis of her sex during – or just before – the limitations period. The decision to discriminate may have been made years ago – even, as in *Bazemore*, before such discrimination became unlawful. . . . If it were the case that a Goodyear manager made an openly discriminatory salary-setting decision back in 1979 (when Ledbetter was hired), and that all the company's decisions affecting her salary since then were non-discriminatory, Ledbetter could and should have challenged that 1979 decision by filing a timely charge. But her failure to do so does not deprive her of the right to seek relief for discriminatory paychecks she received in 1997 and 1998.

EEOC Br. in Support of Pet. for Reh'g and Suggestion for Reh'g En Banc (Oct. 26, 2005) at 12 & 14.

The EEOC also has consistently applied these principles in deciding pay-discrimination cases brought by federal employees. One recent decision explained that the Commission's interpretation is entirely consistent with *Morgan*:

> In *Morgan*, the Supreme Court expressly relied on its statement in [*Bazemore*], regarding each paycheck paid at a discriminatory rate as an example of an actionable "discrete act or single occurrence, even when it has a connection to other acts." The Court did not characterize *Bazemore*

> as involving a "continuing violation" or as embracing a continuing violation doctrine. Instead, the Court reaffirmed the *Bazemore* statement that each discriminatory paycheck was a separate discriminatory act. Therefore, reading *Bazemore* in light of *Morgan*, as long as one incident of alleged disparate pay occurred within the time limits for bringing the claim, the complaint should be accepted for investigation.

Amft v. Mineta, Appeal No. 07A40116, 2006 EEOPUB LEXIS 1472, at *13-14 (E.E.O.C. Dec. Apr. 6, 2006) (citations omitted).

In another post-*Morgan* decision, the EEOC accepted an Equal Pay Act complaint for investigation because at least "one incident of alleged disparate pay occurred within the time limits for bringing the claim." *McCrae v. Gutierrez*, Appeal No. 01A53762, 2005 EEOPUB LEXIS 4298 (E.E.O.C. Dec. Sept. 9, 2005). The EEOC explained:

> [I]t [is] well settled that repeated occurrences of an alleged discriminatory act such as the issuance of a paycheck, is a wrong that is actionable. . . . This means that as long as one incident of alleged disparate pay occurred within the time limits for bringing the claim, the complaint should be accepted for investigation.

Id. at *2 (citations omitted). As demonstrated by these administrative decisions, the EEOC has consistently applied its well-reasoned interpretation of *Bazemore* and *Morgan*.

As an "administrative interpretation of [Title VII] by the enforcing agency," *Griggs*, 401 U.S. at 433-34, EEOC guidance "constitute[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Gen. Elec.*, 429 U.S. at 141-42, *quoting Skidmore*, 323 U.S. at 140; *see also Burlington N.*, 126 S. Ct. at 2413-14 (deferring to the EEOC's interpretation of Title VII's anti-retaliation provision); *Smith*, 544 U.S. at 235 (citing EEOC guidance to support the conclusion that

a disparate-impact theory is cognizable under the Age Discrimination in Employment Act). After *Morgan*, the EEOC concluded that the principles enunciated in *Bazemore* still apply, and that "[r]epeated occurrences of the same discriminatory employment action, such as discriminatory paychecks, can be challenged as long as one discriminatory act occurred within the charge filing period." EEOC Compliance Manual, § 2-IV.C.1.a (issued July 21, 2005) (footnotes omitted). As the federal agency charged with interpreting and enforcing Title VII, its consistent view that each paycheck may constitute a new act of discrimination should be accorded deference.

D. The Issuance of Each Paycheck that Compensates Similarly-Situated Men and Women Differently May Reflect an Intent to Discriminate.

The Eleventh Circuit is mistaken in ruling that only the decisions originally creating the disparity in pay may qualify as actionable discrimination and that issuance of each successive paycheck in which those disparities persist fails to qualify as conduct that violates Title VII. The court below required evidence of an "affirmative decision" to set pay levels in order to constitute actionable conduct and dismissed as legally inconsequential the actions of Goodyear to perpetuate the pay disparity with each new paycheck it issued. *Ledbetter*, 421 F.3d at 1177, 1180, 1183, 1184 (referring to an "affirmative decision" on five separate occasions). Moreover, the Eleventh Circuit appears to confuse the Title VII requirement that evidence of intent to discriminate be shown with an expectation that "ill will" be demonstrated. In doing so, the court failed to appreciate the ways in which intent to discriminate was manifested in Petitioner's case below. *Id.* at 1186 ("There was no evidence that he bore any ill will towards Ledbetter or toward women generally."). These are fundamental errors in application of Title VII. Because the Eleventh Circuit was looking for an "affirmative decision" which reflected

"ill will" during the limitations period, the court overlooked the myriad ways in which intentional discrimination can be shown to have existed at Goodyear during the time period encompassed by Petitioner's charge.

An "affirmative decision" is not a required element of proof to establish liability under Title VII. A plaintiff establishes a *prima facie* case of discrimination in compensation by demonstrating she is a member of a protected class, performs work substantially equal to that of persons outside that protected class, and is compensated less than those similarly situated. *Coward v. ADT Sec. Sys., Inc.*, 140 F.3d 271, 273 (D.C. Cir. 1998); *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1087 (3d Cir. 1996); *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1529 (11th Cir. 1992) (*prima facie* case consists of showing membership in protected class and that plaintiff's job is similar to higher paying jobs occupied by non-class members). A plaintiff must show she is treated less favorably than others similarly-situated, but not that the difference in pay is the result of an "affirmative decision." *Goodwin*, 275 F.3d at 1012. *Bazemore* recognized, for example, that an employer has an affirmative "obligation to eradicate" salary disparities due to past discriminatory decisions, even if those earlier discriminatory decisions were lawful at the time they were made. *Bazemore*, 478 U.S. at 397. The perpetuation of those pay disparities into a period when they are prohibited creates liability under Title VII. *Id.* Whether this conduct qualifies as an "affirmative decision" or not, nothing more is required to violate Title VII.[5] Thus, the Eleventh Circuit erred by requiring evidence of an "affirmative decision" within the limitations period beyond the decision to issue a paycheck.

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[5] The EEOC likewise has interpreted Title VII to require an employer to eliminate pay disparities where they can be attributed to a prohibited ground, regardless of when the disparity first occurred. EEOC Compliance Manual § 10-III (2006).

Nor is the Eleventh Circuit correct in requiring evidence of ill will to demonstrate intentional discrimination. This Court has defined intentional discrimination: "To discriminate is to make a distinction, to make a difference in treatment or favor." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 (1989) (*quoting* 110 Cong. Rec. 7213 (1964)). This Court has explicitly rejected the argument, which the Eleventh Circuit embraced below, that a showing of animus against women is required to show an intentional difference in treatment. *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991); *see also EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1283-84 (11th Cir. 2000).

The record below reveals that Goodyear manifested an intention to pay Petitioner less than similarly-situated men, which violated Title VII. With the issuance of each paycheck, Goodyear had the opportunity and the obligation to "eradicate" the disparity in pay between Ms. Ledbetter and similarly situated men. *Bazemore*, 478 U.S. at 397. Goodyear could have eliminated the pay disparity during its annual pay-raise reviews, but it *chose* not to do so. Goodyear's repeated failure to eliminate disparities in pay that it perpetuated with each paycheck creates an inference of intentional discrimination within the applicable limitations period. The Eleventh Circuit erred by concluding otherwise.

The Eleventh Circuit mistakenly regarded Goodyear's compensation system as operating automatically, leaving no discretion to adjust pay levels or eliminate the pre-existing pay disparities. *Ledbetter*, 421 F.3d at 1172-73, 1182. Issuance of paychecks to each employee, of course, can be terminated when employees are discharged. Similarly, errors in paychecks can be corrected. Nothing precluded Goodyear from eliminating the gender-based pay disparities, and the issuance of each paycheck afforded it regular opportunities to do so. A compensation system that can be adjusted to stop payment to discharged employees

or correct errors in withholding or other administrative actions is equally available to eliminate unlawful pay disparities. Goodyear simply declined to do so and that failure constitutes intentional discrimination. Even the frequency with which an employer reviews the compensation levels of its workforce is a matter of choice. Vigilant employers that seek to ensure against illegitimate disparities in pay can, and often do, regularly examine the pay levels of their workers and, where disparities are observed that may suggest impermissible factors, investigate those anomalies to determine whether they should be adjusted. Employers also have the choice whether to reexamine total compensation levels or just whether a pay adjustment is warranted. The choice to circumscribe compensation review to the more limited inquiry of whether a pay raise is warranted cannot relieve an employer of its responsibility to ensure that its total compensation is equitable.[6] EEOC Compliance Manual §§ 10-III and 10-III(A)(1)(c)(2) (discrimination may be found where "[a]n employer pays employees inside a protected class less than similarly situated employees outside the protected class" and the employer's explanation does not account for "the entire compensation disparity."). In either event, Title VII makes employers responsible for ensuring the total compensation paid does not differ due to gender, race or other prohibited grounds.[7]

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[6] Indeed, if an employer considers only whether a pay raise is warranted, it ratifies the prior base salary, and adopts any discriminatory intent that motivated the earlier decision.

[7] The situation is unlike *United Airlines v. Evans*, 431 U.S. 553 (1977) in which the employer had a facially neutral seniority system in which no employee who was rehired was given any seniority credit for prior service, and thus both male and female employees were treated alike. At Goodyear, men who were paid the same salary as Petitioner in 1979 were paid a substantially higher salary than she was in 1998, even though both were doing the same job. Thus, in *Evans* the plaintiff complained that she was treated differently than men in the past, and that therefore it was unfair for her to be treated the same as men who

(Continued on following page)

As the entity with the best access to, and often the only access to, information about the compensation paid to similarly-situated employees, employers have been entrusted by Title VII with the responsibility for ensuring against unlawful disparities in pay. The failure to correct known disparities that are attributable to prohibited grounds supports an inference of intentional discrimination.[8] "When the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences [here], a strong inference that the adverse effects were desired can reasonably be drawn." *Personnel Admin'r of Mass. v. Feeney*, 442 U.S. 256, 279 n.25 (1979).

Nor is a company's prior conduct irrelevant in assessing whether its present pay practices evidence an intent to discriminate. The Court has held:

> Proof that an employer engaged in racial discrimination prior to the effective date of Title VII might in some circumstances support the inference that such discrimination continued, particularly where relevant aspects of the decision-making process had undergone little change.

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were terminated for lawful reasons in the past. However, in the case at bar, Petitioner complains that she was treated the same as her male peer in the past (1979), but that her current treatment, specifically the disparity in pay, is unlawful. The wrong of which *Evans* complained was in the past, but the wrong of which Petitioner complains is in the present.

[8] In general, actions which have "foreseeable and anticipated" consequences can be found to have been taken with the "forbidden purpose" of achieving those consequences. "Adherence to a particular policy or practice, 'with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn.'" *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464-65 (1979).

Bazemore, 478 U.S. at 402, *quoting Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 309-10 (1977). Prior discriminatory conduct committed by Goodyear, even if not actionable, was certainly relevant in assessing the lawfulness of its conduct committed within the limitations period. *See Evans*, 431 U.S. at 558; *see also Morgan*, 536 U.S. at 113. Thus, the issuance of disparate paychecks to similarly situated individuals constitutes actionable discrimination. For all of these reasons, the Eleventh Circuit's decision must be reversed.

II. TITLE VII WAS ENACTED AND AMENDED AGAINST A BACKDROP OF STATUTORY INTERPRETATION ALLOWING PLAINTIFFS TO RECOVER FOR RECURRING VIOLATIONS OF PAST WRONGS.

Congress enacted and amended Title VII, and this Court should interpret Title VII, against a backdrop of other statutes that consistently have been interpreted to allow plaintiffs to recover for recurring violations of statutes, even when the initial violation occurred outside the limitations period.[9] Both before and after *Morgan*, for example, courts have held that each discriminatory

[9] In some of the cases cited herein, courts permitting recovery for recurring violations within the limitations period, where a violation had begun outside of the limitations period, referred to this as a "continuing violation." However, examination of the analysis in these cases reveals that the courts were not endorsing the sort of "continuing violation" that *Morgan* found inapplicable to discrete violations of Title VII, in which a plaintiff is permitted to recover for an entire series of violations, even those violations that pre-date the statute of limitations, but instead were following the rule adopted in *Bazemore* that fresh violations within the limitations period were actionable. *Morgan*, 536 U.S. at 110-12; *Bazemore*, 478 U.S. at 395-96. Commentators have recognized that courts often use the phrase "continuing violation" to describe both of these distinct concepts. *See* Douglas Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, 49 Law & Contemporary Problems 53, 55-57 (1986).

paycheck that falls under the Equal Pay Act of 1963 ("EPA") constitutes a discrete actionable harm. Similarly, Congress modeled Title VII's limitations provisions after the National Labor Relations Act ("NLRA"), which – as courts have consistently held – allows plaintiffs to sue on recurring instances of an illegal act, even if the initial illegal act occurred outside the limitations period. *See, e.g.*, *Atlas Air, Inc. v. Air Line Pilots Ass'n*, 232 F.3d 218, 226 (D.C. Cir. 2000) (holding that "maintaining and continuing to maintain" an exclusionary profit-sharing plan during the limitations period constituted an actionable violation, despite the fact that the profit-sharing plan originated outside the limitations period); *Brenner v. Local 514, United Bhd. of Carpenters and Joiners of Am.*, 927 F.2d 1283, 1296 (3d Cir. 1991). Likewise, each paycheck that fails to compensate an employee for overtime hours worked in violation of the Fair Labor Standards Act ("FLSA") constitutes a distinct statutory violation that starts the statute of limitations period anew. *See, e.g.*, *Knight v. Columbus, Ga.*, 19 F.3d 579, 581-82 (11th Cir. 1994) (collecting FLSA cases); *Hodgson v. Behrens Drug Co.*, 475 F.2d 1041, 1050 (5th Cir. 1973) (applying equal pay provisions of the FLSA).[10]

There is no reason to believe that Congress, legislating against this statutory backdrop, intended to abandon this limitations framework when passing Title VII. *See, supra*, Section I.B. Moreover, as a matter of policy, courts, including this Court, should attempt to interpret statutes consistently and harmoniously. "Harmony and consistency are positive values in our legal system, because they serve the interests of impartiality and minimize arbitrariness. Construing statutes by reference to others advances those

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[10] The accrual of Title VII pay discrimination claims at the time of payment is consistent not only with other employment and civil rights statutes, but also with other long-standing statutory schemes such as the Sherman Act. *See, e.g., Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997) (collecting antitrust authorities).

values. In fact, courts have been said to be under a duty to construe statutes harmoniously where that can reasonably be done." 2B Sutherland Statutory Construction § 53:1 (6th ed. 2005). Just as is the case in the statutory schemes described below, a claimant's prior notice of an ongoing Title VII violation does not deprive that claimant of the ability to recover for the violations that continue into the charge-filing period.

A. Title VII Should Be Construed in Accordance With Equal Pay Act Precedent Holding That Each Paycheck Constitutes a Discrete Violation.

Like Title VII, the Equal Pay Act of 1963 ("EPA") prohibits wage discrimination.[11] Although the EPA and Title VII differ in some respects, courts have consistently held that Title VII and the EPA are *in pari materia* and thus should be construed similarly.[12] *See, e.g., Lavin-McEleney v.*

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[11] The EPA is violated when an employer "discriminate[s] . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." 29 U.S.C. § 206(d)(1) (2006).

[12] Although this Court has not addressed the issue directly, in *County of Washington v. Gunther*, 452 U.S. 161 (1981), it said the two statutes should be construed *in pari materia*. In interpreting the Bennett Amendment to Title VII, the Court held that, "[t]he Bennett Amendment was offered as a 'technical amendment' designed to resolve any potential conflicts between Title VII and the Equal Pay Act. Thus . . . the Bennett Amendment has the effect of guaranteeing that courts and administrative agencies adopt a consistent interpretation of like provisions in both statutes. Otherwise, they might develop inconsistent bodies of case law interpreting two sets of nearly identical language." *Id.* at 170. In his dissenting opinion, Justice Rehnquist agreed with the fundamental conclusion that "there can be no doubt that the Equal Pay Act and Title VII should be construed *in pari materia*" and that "Congress intended to incorporate the substantive standards of the Equal Pay Act into Title VII." *Id.* at 189 & 190.

Marist Coll., 239 F.3d 476, 483 (2d Cir. 2001); *Gunther v. County of Wash.*, 623 F.2d 1303, 1309 (9th Cir. 1979), *aff'd*, 452 U.S. 161 (1981); *Di Salvo v. Chamber of Commerce of Greater Kan. City*, 568 F.2d 593, 596 (8th Cir. 1978); *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 266 (3d Cir. 1970).

In deciding statute of limitations issues in EPA cases, courts have looked to *Bazemore* and *Morgan* for guidance. In EPA cases decided both before and after *Morgan*, courts consistently have held that each paycheck issued under a discriminatory wage policy is a discrete violation of the EPA. Prior to *Morgan*, it was well settled among the circuits that "each issuance of a paycheck to a female employee at a lower wage than that issued to her male counterpart constitutes a new discriminatory action for purposes of Equal Pay Act limitations accrual." *Brinkley-Obu*, 36 F.3d at 347, *citing Nealon v. Stone*, 958 F.2d 584, 591 (4th Cir. 1992); *see also Pollis v. The New Sch. for Social Research*, 132 F.3d 115, 119 (2d Cir. 1997); *Ashley*, 66 F.3d at 167-68; *Gandy v. Sullivan County, Tenn.*, 24 F.3d 861, 864 (6th Cir. 1994) ("The Equal Pay Act is violated each time an employer presents an 'unequal' paycheck to an employee for equal work." (citations omitted)); *Erickson v. N.Y. Law Sch.*, 585 F. Supp. 209, 213 (S.D.N.Y. 1984) ("Under the [Equal Pay Act], a separate claim accrues each time the aggrieved employee receives a paycheck reflecting discriminatory wages.").

Post-*Morgan*, lower courts have continued to hold that each paycheck issued under a discriminatory wage policy is a discrete violation of the EPA. *See Byrne v. Telesector Res. Group, Inc.*, No. 04-CV-76S, 2005 WL 464941, at *11 (W.D.N.Y. Feb. 25, 2005); *Downes v. JP Morgan Chase & Co.*, No. 03 Civ.8991(GEL), 2004 WL 1277991, at *7 (S.D.N.Y. June 8, 2004) ("A new claim accrues each time an employee receives a paycheck under a discriminatory wage policy."); *Calvello v. Elec. Data Sys.*, No. 00CV800, 2004 WL 941809, at *2 (W.D.N.Y. Apr. 15, 2004), *aff'd*, 151 Fed. Appx. 35 (2d Cir. 2005) (*citing* both *Morgan* and

Bazemore to reach the conclusion that "[f]or the Equal Pay Act or wage discrimination aspects of plaintiff's Title VII claim, each paycheck constitutes an actionable discrete act for which the statute of limitations runs.").

Because Title VII and the EPA are *in pari materia*, Title VII should also be construed to permit a claim of compensation discrimination if the plaintiff received a discriminatory paycheck within the statute of limitations, even if the decision to pay her a lower wage originated outside the statutory period.

B. Congress Modeled Title VII's Limitation Period on the NLRA's Limitation Period, Which Allows Plaintiffs to Recover for the Recurring Application of Violations That Began Prior to the Limitations Period.

Because Congress fashioned the remedial scheme in Title VII, including its limitations period for filing an administrative charge, after the NLRA, *see Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 & 421 n.11 (1975), Congress must have intended courts to apply the two statutes' limitations periods in a similar manner. Indeed, Title VII's limitations period originates from and is substantially similar to the NLRA's statute of limitations. *Compare* 42 U.S.C. § 2000e-5 *with* 29 U.S.C. § 160(b).[13] Accordingly, courts often rely on NLRA § 10(b) (29 U.S.C. § 160(b)) to help interpret § 706(e) of Title VII. Such reliance is particularly appropriate since the unusual requirement of an administrative charge is common to the two statutes. *Id.*; *see also Zipes v. TWA*, 455 U.S. 385, 395 n.11 (1982) (finding that the time limitations of

[13] Section 10(b) of the NLRA provides, in relevant part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of [a] charge with the [National Labor Relations] Board and the service of a copy thereof upon the person against whom such charge is made." 29 U.S.C. § 160(b).

§ 706(e) should be treated in the same manner as those contained in the NLRA). Thus, when interpreting § 706(e), "reference must be made to actual operation and experience in administering the [NLRA]." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 774-75 n.34 (1976); *cf. Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 849 (2001) (stating that the Courts' construction of NLRA § 10(c) before the enactment of Civil Rights Act of 1964 provides "guidance as to the proper meaning of the same language in § 706(g) of Title VII"). Subsequent amendments to Title VII have not altered Title VII's reliance on the NLRA model. In 1972, Congress expanded Title VII's limitations period. *See Mohasco Corp. v. Silver*, 447 U.S. 807, 818-24 (1980). The House and Senate committee reports on the 1972 amendments labeled the structure of the new limitations period as "similar to" or "identical to" the six-month limitations period that applied under § 10(b) of the NLRA. *See* S. Rep. No. 92-415 (1971); H.R. Rep. No. 92-238 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 2137, 2174-75 (Minority Views).

Courts have long held that § 10(b) of the NLRA allows plaintiffs to recover for the recurring application of violations decided upon and begun prior to the limitations period. Under the NLRA, a plaintiff may challenge a recurring unfair labor practice that causes harm within the six-month statutory period, even if a charge alleging the same violation, or a similar and related violation, could have been brought before the six-month period. *See, e.g., N.L.R.B. v. F.H. McGraw & Co.*, 206 F.2d 635, 639 (6th Cir. 1953) (finding an actionable claim where "the unfair labor practice alleged in the complaint was not the execution of this contract, but its enforcement and implementation . . . within the period of limitations"); *Katz v. N.L.R.B.*, 196 F.2d 411, 415 (9th Cir. 1952) ("continued and continuous enforcement" of illegal union shop agreement constituted a redressable violation); *N.L.R.B. v. Carpenters Local Union No. 1028*, 232 F.2d 454, 456 (10th Cir. 1956) (discriminatory enforcement of closed-shop agreement

during limitations period satisfies Section 10(b)); *Melville Confections, Inc.*, 142 N.L.R.B. 1334, 1335 & n.1, 1337-39 (1963) (finding that a profit-sharing plan adopted in 1957 "and made known to [the company's] employees at all times thereafter" warranted relief when charge was filed in September 1962), *enforced*, 327 F.2d 689, 692 (7th Cir. 1964).

Given Congress' reliance on the NLRA when passing and amending Title VII, and given courts' and the NLRB's established practice of permitting suit for recurring violations within the limitations period despite the fact that the original wrong-doing occurred outside the statutory period, there is every reason to believe that Congress intended the same principle to apply in the Title VII context. Under the NLRA, where a party continues to issue deficient paychecks that cause recurring harm within the limitations period, each failure to pay the required amount is actionable conduct that gives rise to a new cause of action. *See, e.g., Farmingdale Iron Works*, 249 N.L.R.B. 98, 99 (1980) ("[E]ach failure to make the contractually required monthly benefit fund payments constituted a separate and distinct violation of Respondents' bargaining obligation and, therefore, that any benefit fund payment due [within the limitations period] is subject to the Board's remedial powers."); *The Kroger Co.*, 334 N.L.R.B. 847 (2001) (ordering a union to refrain from continually deducting union dues from the plaintiff's paycheck). The same should hold true in the Title VII context.

C. The Treatment of Recurring Violations in the Fair Labor Standards Act and Title VII Should Be Parallel.

Long before passage of Title VII, it was well settled that, under the FLSA, "[a] separate cause of action for overtime compensation 'accrues' at each regular payday immediately following the work period during which the

services were rendered and for which the overtime compensation is claimed." *Dunlop v. State of R.I.*, 398 F. Supp. 1269, 1286 (D.R.I. 1975) (*citing Mitchell, Sec'y of Labor v. Lancaster Milk Co.*, 185 F. Supp. 66, 70 (M.D. Pa. 1960) (same quote) and *Shandelman v. Schuman*, 92 F. Supp. 334, 335 (E.D. Pa. 1950) (same quote)). Thus, the statute of limitations under the FLSA begins anew with each wrongfully calculated paycheck, with no reference to the moment when the employer actually decided to classify an employee as exempt from overtime pay requirements. Of course, the classification decision, even if it was made several years earlier, is nonetheless relevant to litigation over the existence of a current violation of the FLSA, because employers are immune from liability for their wrongfully calculated paychecks if they can prove that the classification decision was made in "good faith." 29 U.S.C. § 260. Yet the FLSA allows claims for each paycheck wrongly calculated, regardless of when the exemption classification decision was made.

Thus, under the FLSA, each new paycheck is a violation. "Each failure to pay overtime constitutes a *new* violation." *Knight*, 19 F.3d at 581 (emphasis in original); 22A Fed. Proc., L. Ed. § 52:1714 (2006) ("A cause of action accrues when an employer fails to pay required compensation. . . . A new cause of action accrues each time an employer fails to pay full compensation on the regular payday."); 29 C.F.R. § 790.21(b) ("The courts have held that a cause of action under the Fair Labor Standards Act for unpaid minimum wages or unpaid overtime compensation and for liquidated damages 'accrues' when the employer fails to pay the required compensation for any workweek at the regular pay day for the period in which the workweek ends." (citing cases)); Ellen C. Kearns, The Fair Labor Standards Act § 18.VI.B.6 (1999), at 1210 ("It is well established under the FLSA that an action seeking payment of the minimum wage or overtime compensation accrues when the employer fails to pay the required compensation then due."). Congress enacted Title VII

against the backdrop of earlier decisions under the FLSA, holding that each paycheck that failed to include overtime compensation constituted a recurring statutory violation which started anew the statute of limitations, and this Court should interpret Title VII in the same way, and hold that each paycheck which pays a woman less than a similarly situated man constitutes a new Title VII violation for limitations purposes.

Preventing an employee from remedying a recurring violation simply because the conduct is long-standing serves no purpose. The employer is aware of the continued consequences of its illegal acts, and employees continue to suffer – with ever-growing heft – the expense of that conduct. The law permits suit on recurring violations carried out during the limitations period pursuant to decisions to violate the law which pre-date the limitations period because that wrongful intent is equally present in each application of the earlier decision. A contrary rule would permit the wrongdoer to benefit from its wrongful act indefinitely merely because the first instance of the repeated wrongdoing was not timely challenged.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

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APPENDIX

The National Employment Lawyers Association (NELA) is the only professional membership organization in the country comprised of lawyers who represent employees in labor, employment and civil rights disputes. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA advocates for employee rights and workplace fairness while promoting the highest standards of professionalism, ethics and judicial integrity.

The Lawyers' Committee for Civil Rights Under Law is a non-profit, nonpartisan organization founded in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. The principal mission of the Lawyers' Committee is to secure, through the rule of law, equal justice for all Americans. Its Board of Trustees includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. Through the Lawyers' Committee and its independent local affiliates, hundreds of attorneys have represented thousands of clients in employment discrimination cases across the country. The Lawyers' Committee, through its Employment Discrimination Project, has been continually involved in cases before the Court involving the proper scope and coverage afforded to federal civil rights laws prohibiting employment discrimination.

The Asian American Justice Center ("AAJC") is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Americans. Collectively, AAJC and its Affiliates, the Asian American Institute, Asian Law Caucus and the Asian Pacific American Legal Center, have over 50 years of experience in providing legal public policy, advocacy, and community education on discrimination issues. AAJC have a long-standing interest in racial discrimination issues that have an impact on the Asian American community, and this interest has resulted in AAJC's participation in a number of amicus briefs before the courts.

The National Association for the Advancement of Colored People (NAACP) is a non-profit membership corporation chartered by the State of New York and traces its roots to 1909. The NAACP has over 2,200 units in the United States and abroad. As the nation's oldest and largest civil rights organization, its mission is to ensure the political, educational, social and economic equality of rights of all persons and to eliminate racial hatred and racial discrimination. With that, the NAACP has long fought against discrimination in employment and to protect the civil rights of workers.

AARP is a nonpartisan, nonprofit membership organization of people age 50 and older dedicated to addressing the needs and interests of older Americans. Almost half of AARP's more than 36 million members are in the work force and are, thus, protected by the federal civil rights laws prohibiting employment discrimination. The proper interpretation and vigorous enforcement of these laws is of paramount importance to AARP and its working members, who rely on them to deter and remedy invidious bias in the work place. Since 1985, as part of its

advocacy efforts, AARP has filed *amicus curiae* briefs in many cases in this Court involving the proper construction and interpretation of Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and other federal workplace antidiscrimination statutes. AARP supports the rights of older workers under the ADEA, whose prohibitions are derived from and interpreted *in pari materia* with those of Title VII. Since the Court's decision in this case will necessarily impact the ADEA, by submitting this brief *amicus curiae* AARP seeks to preserve and protect the rights of all older workers.

The Legal Aid Society – Employment Law Center ("LAS-ELC") is a non-profit public interest law firm whose mission is to protect, preserve, and advance the workplace rights of individuals from traditionally underrepresented communities. Since 1970, the LAS-ELC has represented plaintiffs in cases involving the rights of employees in the workplace, particularly those cases of special import to communities of color, women, recent immigrants, individuals with disabilities, and the working poor.

The LAS-ELC's interest in preserving the protections afforded employees by this country's antidiscrimination laws is longstanding. *Amicus* has a particular interest in the interpretation of established precedent concerning Title VII's limitations period, given its involvement in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). The LAS-ELC has also appeared in this Court on numerous other occasions both as counsel for plaintiffs, *see, e.g., U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (counsel for real party in interest), as well as in an *amicus curiae* capacity. *See, e.g., Burlington*

Northern and Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (2006); *Suders v. Pennsylvania State Police*, 542 U.S. 129 (2004); *United States v. Virginia*, 518 U.S. 515 (1996); *Harris v. Forklift Systems*, 510 U.S. 17 (1993); *International Union, UAW v. Johnson Controls*, 499 U.S. 187 (1991); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

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IN THE

Supreme Court of the United States

LILLY M. LEDBETTER,
Petitioner,

v.

GOODYEAR TIRE & RUBBER COMPANY, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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ADDITIONAL AMICI CURIAE

9to5, National Association of Working Women
American Association of University Women
American Civil Liberties Union
Coalition of Labor Union Women
Connecticut Women's Education & Legal Fund
Equal Rights Advocates
Feminist Majority Foundation
HADASSAH
Legal Momentum
MANA National Latina Organization
National Asian Pacific American Women's Forum
National Association of Social Workers
National Council of Women's Organizations
National Organization for Women Foundation
National Women's Law Center
Northwest Women's Law Center
Pick Up the Pace
The Women's Law Center of Maryland
Wider Opportunities for Women
Women Employed
Women's Advocacy Project, Inc.
Women's Bar Association of the District of Columbia
Women's Law Project

QUESTION PRESENTED

Whether and under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period.

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INTEREST OF *AMICI CURIAE*

Amici curiae are twenty-four organizations that share a longstanding commitment to civil rights and equality in the workplace for all Americans. Statements of interest for the individual organizations are attached in the Appendix.[1]

SUMMARY OF ARGUMENT

Under the ruling below, an employee cannot challenge pay discrimination resulting from any decisions made before the most recent pay decision prior to the 180-day limitations period under Title VII of the Civil Rights Act of 1964. This represents a stark and abrupt change in the law. *Cf. Bazemore v. Friday*, 478 U.S. 385, 395-96 (1986) (Brennan, J., concurring) ("Each week's paycheck that delivers less to a black than a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII."). As even the Eleventh Circuit acknowledged, *Bazemore* was widely understood to permit a plaintiff to challenge ongoing pay discrimination, regardless of how far back the decision to discriminate was made. Pet. App. 20a-22a n.17. Contrary to the view of the court below, this Court's decision in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), fully supports this understanding of *Bazemore*.

The Eleventh Circuit's ruling can only aggravate the longstanding gender wage gap. To this day, women earn less than men in virtually every occupation and job category, at every age and stage in the employment lifecycle, and for every hour worked. The wage gap expands over the course of a woman's working life, with serious economic consequences. Pay discrimination is responsible for a significant

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[1] Letters of consent are on file with the Clerk. No counsel for either party has authored any portion of this brief, nor has any person or entity, other than *amici* and their counsel, made a monetary contribution to the preparation or submission of this brief.

portion of this gap, and Title VII must be construed broadly and fairly in order to effectively combat it.

The Eleventh Circuit's untethering of discriminatory pay decisions from the subsequent paychecks that implement them is contrary to the way in which typical employers set and review wages. By not permitting employees to challenge pay decisions that continue to affect their paychecks, the court below has created a safe harbor for pay discrimination to persist and grow over time.

The ruling below improperly imposes overwhelming burdens on the victims of pay discrimination. Pay discrimination is rarely accompanied by overt bias, and employee salaries are notoriously cloaked in secrecy. Victims thus have difficulty perceiving pay discrimination and, in any event, are unlikely to promptly complain about it. These difficulties are compounded for employees subjected to discrimination in their starting salaries, when much pay discrimination begins. A discovery rule, although appropriate for Title VII claims generally, would do little to alleviate these concerns and would turn virtually every pay discrimination case into a messy factual dispute over what the plaintiff knew and when. Employees governed by the lower court's ruling will face undue pressure to file first and ask questions later in order to preserve their Title VII rights.

At the same time, the decision below undermines the incentives for employers to prevent and correct pay discrimination. Because this ruling grandfathers in pre-existing pay discrimination, it creates little incentive for employers to find and correct pay disparities between male and female workers. Instead, it encourages employers to conduct periodic *pro forma* salary reviews so as to insulate prior discriminatory decisions from challenge.

Title VII's language and intent foreclose the rule adopted by the court below in three respects. First, Title VII makes an unlawful employment practice the trigger for the limitations period. In a pay discrimination case, the unlawful employ-

ment practice is the payment to an employee of less money because of her sex. Consequently, any discriminatory paycheck received within the limitations period is actionable, regardless of when the decision to pay the plaintiff a discriminatory salary first was made. Second, Title VII allows for up to two years' backpay from the date of filing a charge—a provision which would make little sense unless a plaintiff could challenge pay discrimination that begins prior to and continues into the limitations period. Finally, the Civil Rights Act of 1991, which overturned this Court's decision in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), clearly reflects Congress' intention that Title VII reach the current implementation of prior discriminatory decisions.

ARGUMENT

I. THE RULING BELOW IGNORES THE REALITIES OF PAY DISCRIMINATION.

A. Pay Discrimination Remains an Intractable Problem for Women in the Workplace.

The gender-based wage gap in the United States is persistent and well-documented. Although researchers disagree about the size of the gap, almost all agree that it exists and is significant.

Current estimates of the gender wage gap hover between seventy and eighty percent—meaning that a woman, on average, earns seventy to eighty cents for every dollar earned by a man. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Highlights of Women's Earnings in 2003*, at 29 tbl. 12, 31 tbl. 14 (Sept. 2004) (reporting that women's median weekly earnings were 79.5% of men's in 2003, but only 73.6% for college graduates). The pay gap is especially pronounced for African American women and Hispanic or Latino women, who earn even less on the dollar compared to white men. *See id.* at 3 cht. 2 (reporting median usual weekly earnings of $715 for white men, $567 for white women, $491

for black or African American women, and $410 for Hispanic or Latino women); *cf.* Amy Caiazza et al., Inst. for Women's Pol'y Res., *The Status of Women in the States, Women's Economic Status in the States: Wide Disparities by Race, Ethnicity, and Region* 24-25 (Apr. 2004) (finding wide variation in Asian American women's wages). Although the gender wage gap today is narrower than the 1970s measure of fifty-nine cents on the dollar, the bulk of the change occurred during the 1980s, and studies show little additional progress since 1990. *See* Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. Rev. 707, 715 (2000).

The gender wage gap exists at every level of earnings. *See, e.g.*, Daniel H. Weinberg, U.S. Dep't of Commerce, Census 2000 Special Reports, *Evidence from Census 2000 About Earnings by Detailed Occupation for Men and Women* 7 (May 2004).[2] Moreover, the disparity in men's and women's wages extends, with some variation, throughout the employment lifecycle. Women in their 40s and 50s earn salaries more disparate from their male counterparts than do women at the beginning of their careers. *See, e.g.*, Bureau of Labor Statistics, *supra*, at 11 tbl. 1 (finding, based on data from the Current Population Survey, that women ages 45-54 earn 73% of what men earn, while women ages 25-34 earn 87% of what men earn); Francine D. Blau et al., *The Economics of Women, Men, and Work* 150 (5th ed. 2006) ("women earn less than men in all age categories," and the ratio of women's earnings to men's decreases as they age). When earnings over a longer

[2] The gap is largest at the top of the earnings spectrum. For example, "Physicians and Surgeons" is the highest paid occupational category for both sexes, yet the female median ($88,000) is only 63% of the male median ($140,000). *See* Weinberg, *supra*, at 12 tbl. 5. The wage gap remains significant at the bottom of the earnings spectrum, however, especially since the effect of real-dollar differences may be felt most acutely by lower-wage workers. *See id.* at 13 tbl. 6 (citing example of "Teacher assistants," a lower-paid occupation, where the female median, $15,000, is 75% of the male median of $20,000).

period of time are aggregated, the gap is even starker. In their prime earning years, women earn only 38 percent of what men earn over a 15-year period. *See* Stephen J. Rose & Heidi I. Hartmann, Inst. for Women's Pol'y Res., *Still a Man's Labor Market: The Long-Term Earnings Gap* 9 (2004).

Discrimination accounts for a significant part of the wage gap. Although there are plausible nondiscriminatory reasons for pay differences between men and women, none of them, even in the aggregate, explains the entire gap. *See* Selmi, *supra*, at 719-43 (reviewing data). For example, part of the wage gap is sometimes attributed to differing degrees of labor force attachment between men and women. Yet, women who work year-round and full-time during at least 12 of 15 consecutive years earn only 64 percent of what men with a similar attachment to the labor force earn. *See* Rose & Hartmann, *supra*, at 10.

Differences in the number of hours worked also fail to explain the gender disparity in wages. Hour-for-hour, women earn less than men. *See* Bureau of Labor Statistics, *supra*, at 2, 25 tbl. 9, 26 tbl. 10, 35-36 tbl. 15, 37-36 tbl. 16 (reporting that among hourly workers, the median hourly wage for women is 85% of the median hourly wage for men). Similarly, differences in education explain little of the wage gap. According to 2000 Census data, the "only women aged 35-54 to earn more than 71.4 percent of men at the median are those with some college education, but only a bit more, 72.1 percent." Weinberg, *supra*, at 14, 15 tbl. 9.

Most importantly, when studies simultaneously control for multiple variables such as education, occupation, hours worked, and time away from the workplace because of family care responsibilities, a significant gender gap remains. *See, e.g.*, U.S. Gen. Acct. Office, *Women's Earnings: Work Patterns Partially Explain Difference Between Men's and Women's Earnings*, GAO-04-35 at 2 (Oct. 2003) (examining nationally representative longitudinal data set and concluding that women in 2000 earned only 80% of what men earned

even after accounting for differing work patterns and other "key factors"); Weinberg, *supra*, at 21 ("There is a substantial gap in median earnings between men and women that is unexplained, even after controlling for work experience . . . education, and occupation."); Council of Econ. Advisers, *Explaining Trends in the Gender Wage Gap* 11 (1998) (concluding that women do not earn equal pay even when controlling for occupation, age, experience, and education); Michelle J. Budig, *Male Advantage and the Gender Composition of Jobs: Who Rides the Glass Escalator*, 49 Soc. Prob. 258, 269-70 (2002) (explaining that men are advantaged, net of control factors, in both pay levels and wage growth regardless of the gender composition of jobs).

While debate continues over how much of the gender wage gap is explained by discrimination, clearly some employers continue to practice pay discrimination. For example, employers penalize women for expected leave-taking out of proportion to the patterns many women actually follow. *See* Selmi, *supra*, at 745-50; *cf. Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 730 (2003) (discussing employer reliance on "stereotype-based beliefs about the allocation of family duties" as a form of sex discrimination). There is also a well-documented "wage premium" for married men, but not for married women, and a wage penalty of 10-15% for women who have children. *See* Selmi, *supra*, at 726. Major U.S. corporations have settled multi-million dollar lawsuits for pay discrimination in recent years. *See, e.g.*, Richard W. Stevenson, *Texaco is Said to Set Payment Over Sex Bias*, N.Y. Times, Jan. 6, 1999, at C1; *Boeing Agrees to Pay $4.5 Million as Bias Settlement*, L.A. Times, Nov. 20, 1999, at C1.

Thus, despite modest progress in narrowing the wage gap, sex discrimination in compensation persists, and the need for strong protection under Title VII is as great as ever.

B. The Court Below Disregarded the Cumulative Nature of Pay Discrimination.

The Eleventh Circuit ruled that to challenge current discrimination in pay, a plaintiff can reach no farther back than (and perhaps not even as far as) the pay decision immediately preceding the charge-filing period. Pet. App. 14a. This approach, which treats each pay decision as severable from preceding decisions about an employee's salary, belies the realities of wage discrimination and can only exacerbate the gender wage gap.

Like most employers, Respondent Goodyear Tire and Rubber Company ("Goodyear") sets an employee's initial salary and then periodically determines whether to award a percentage-based increase.[3] Left uncorrected, even a relatively minor initial pay disparity will expand exponentially over an employee's career, even if subsequent raises are determined in a nondiscriminatory fashion. Moreover, under most performance review systems, there is little room to correct a discriminatory current salary. Goodyear's raises, for example, were subject to both individual and group caps. Pet. App. 6a. Thus, once a discriminatory pay rate is set, it is likely to continue throughout an employee's tenure with that employer, and perhaps even provide the basis for determining a starting salary with a subsequent employer.

Illustrating this effect, a study at Carnegie Mellon University found that male students who graduated with a master's degree earned starting salaries 7.6% higher than their female counterparts, for an average annual salary difference of almost $4,000. *See* Linda Babcock & Sara Laschever, *Women Don't Ask: Negotiation and the Gender Divide* 1

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[3] Although the Eleventh Circuit stated that Goodyear "annually reviews and reestablishes employee salary levels," Pet. App. 2a, the record clearly reflects that periodic reviews were confined to a determination of whether to augment an employee's existing salary with a modest percentage-based increase based on performance. Pet. 4 n.5; Pet. Rep. 2-3 n.1.

(2003). Using standard assumptions, the authors explained how a relatively modest disparity generates "sobering results" by the end of a career. *Id.* at 5. In their example, if a 22-year-old man received a starting salary of $30,000, and an equally qualified 22-year-old woman received a starting salary of $25,000, assuming each received identical 3% annual raises, the gap would widen from $5,000 to $15,000 annually by the time they reached age 60. *Id.* The sum total of the difference would rise to a whopping $361,171 over the woman's employment life, and a staggering $568,834 by age 60, if the man earned 3% annual interest on the difference. *Id.*; *see also* Virginia Valian, *Why So Slow?: The Advancement of Women* 3 (1998) ("Very small differences in treatment can, as they pile up, result in large disparities in salary, promotion, and prestige.").

By treating each pay decision as severable from the paychecks that follow, the Eleventh Circuit disregarded the cumulative nature of pay discrimination and misapplied this Court's decision in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). In that case, this Court held that "discrete" decisions such as hiring, firing, promotion, demotion, and transfer trigger Title VII's limitations period. The Court rejected a continuing violation theory for such claims, which would have permitted plaintiffs to challenge discrete acts outside the limitations period if they were "sufficiently related" to timely acts. *Id.* at 114.

Nothing in this Court's decision in *Morgan* supports the Eleventh Circuit's ruling. Discriminatory paychecks are not actionable simply because they are "sufficiently related" to a pay decision that occurred outside the limitations period. *Id.* at 114. They are actionable because they pay less money to an employee because of sex. The court below improperly applied *Morgan* by treating the *decision* to pay an employee less because of sex—as opposed to the paychecks implementing that decision—as the event that triggers the limitations period, cutting off the employee's ability to challenge

subsequent paychecks implementing that decision. That ruling flatly disregards this Court's recognition in *Bazemore*, cited with approval in *Morgan*, 536 U.S. at 111-12, that each discriminatory paycheck is actionable, regardless of when the decision to discriminate in pay first occurred. *See Bazemore*, 478 U.S. at 395-96 (deeming this point "too obvious to warrant extended discussion").

The Eleventh Circuit's ruling ignores these realities of pay discrimination. Unlike a discriminatory termination, the decision to pay a woman a lower salary because of sex is not a time-limited act that is severable from the paychecks that implement that decision. When an employee is fired for a discriminatory reason, the firing will undoubtedly have a prolonged negative effect on the employee. But the discrimination itself has concluded, and the time to complain begins to run. *Morgan*, 536 U.S. at 112-13. Not so for pay discrimination. Rather than being able to begin the process of recovery, a victim of pay discrimination continues to experience the discrimination, not just its effects, with each new paycheck. As the time from the original discriminatory decision grows more distant, the discrimination deficit grows larger. The original decision to pay a woman less because of her sex is, in effect, a policy of discrimination that is carried out paycheck by paycheck, each one of which contains less money for an illegal reason. Left uncorrected, each subsequent paycheck implements the discriminatory decision and brings it to bear anew on the employee.

With the decision below, the Eleventh Circuit has created a safe harbor for employers to watch a discriminatory pay rate grow over time without fear of liability. While many factors may contribute to the gender wage gap, the ruling below will only exacerbate that part of the problem that is attributable to pay discrimination.

II. THE RULING BELOW SADDLES EMPLOYEES WITH UNREALISTIC BURDENS AND CREATES INCENTIVES FOR EMPLOYERS THAT ARE INCONSISTENT WITH TITLE VII.

The rule adopted by the court below is fundamentally inconsistent with the twin goals of Title VII: preventing discrimination and compensating its victims. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). It imposes inordinate burdens on employees who experience pay discrimination and creates perverse incentives for employers not to correct it.

A. The Decision Below Disregards the Difficulties Employees Face in Challenging Pay Discrimination.

The decision below places an untenable burden on employees to complain shortly after the first salary decision that results in a discriminatory paycheck or forever lose the right to challenge any resulting disparities in pay. Given the reality of how employees perceive and respond to pay discrimination, very few will be able to comply with the Eleventh Circuit's rule. Employees who are subjected to pay discrimination at the time they are first hired face an especially unfair predicament. Contrary to the assumption of the court below, the possibility of equitable tolling principles, including a discovery rule, does not solve these difficulties. Because it radically departs from how employees experience pay discrimination, the Eleventh Circuit's interpretation, if allowed to stand, would effectively immunize the vast majority of pay discrimination from Title VII challenge.

1. *The Eleventh Circuit's Ruling is Incompatible with the Realities of How Women Perceive and Respond to Discrimination.*

The Eleventh Circuit's rule places the burden on the employee to quickly discern and challenge each discrim-

inatory pay decision before her next salary review, however cursory, wipes the slate clean. The court's ruling flatly ignores real life experience with discrimination on two fronts: how people recognize that they have been discriminated against and how they choose to respond.

It is well-documented that victims of discrimination rarely recognize immediately that they have experienced discrimination. Researchers in the field of social psychology have documented a "minimization bias" in which the targets of discrimination resist perceiving and acknowledging it as such, even when they experience behavior that objectively qualifies as discrimination. *See* Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18, 25-28 (2005) (summarizing social science research). These attribution errors are especially likely when discrimination is masked and not obvious, leading victims to downplay the likelihood of discrimination and attribute negative outcomes to other causes. *See* Cheryl R. Kaiser & Brenda Major, *A Social Psychological Perspective on Perceiving and Reporting Discrimination*, 31 Law & Soc. Inquiry (forthcoming Nov. 2006) (manuscript at 9, on file with authors); Brenda Major & Cheryl R. Kaiser, *Perceiving and Claiming Discrimination, in The Handbook of Research on Employment Discrimination: Rights and Realities* 279, 285-87 (Laura Beth Nielsen & Robert L. Nelson, eds., 2006).

Although the minimization bias and the difficulty perceiving discrimination are not specific to pay discrimination, victims of pay discrimination are especially susceptible to these attribution errors. One difficulty is the lack of transparency in employee compensation systems and a code of silence governing workplace salaries. While the results of hiring, firing, promotion, demotion and transfer decisions are generally commonly known and discussed, employee compensation is typically hidden under a veil of secrecy. *See, e.g.*, Leonard Bierman & Rafael Gely, *"Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law*, 25 Berkeley J. Emp. & Labor L. 167, 168, 171

(2004) (explaining that social norms discourage discussion of salaries in the workplace and observing that one-third of U.S. private sector employers have policies which, although illegal, bar employees from discussing their salaries, while many other employers informally communicate an expectation of salary confidentiality). Even if an employee fortuitously learns that she earns less than a male colleague, she is unlikely to have access to the information necessary to discern the basis for the disparity. *See id.* at 178 ("Employees observe wage differentials without the full information necessary to evaluate the justifications for differing wages.").

Pay discrimination is especially difficult to perceive because it is rarely accompanied by circumstances suggestive of bias. Indeed, unless it implements a pay cut, a paycheck is unlikely to be experienced as adverse at all. A victim of pay discrimination may even receive raises and be satisfied with her pay, unaware that her male colleagues earn more. In contrast, with a discriminatory hiring, firing, promotion or demotion, the victim immediately knows that she has experienced an adverse employment action. She can search out an explanation from the employer, evaluate it for pretext, and note any comments suggestive of stereotyping or bias. In making sense of any explanation, she will have less difficulty identifying comparators. Pay discrimination, in contrast, is rarely accompanied by any explanation from the employer, comparison with other employees' salaries, or discernible signs of prejudice. Together, these factors make pay discrimination especially difficult to detect. *See* Major & Kaiser, *supra*, at 289-90 (discussing research showing that people are better able to perceive discrimination when it is accompanied by overt indicators of prejudice).

The absence of aggregate data showing comparisons between men and women as a group makes it particularly difficult to perceive discrimination on an individual basis. *See* Kaiser & Major, *supra* (manuscript at 5-6). Yet this is precisely the situation in which a prospective pay discrim-

ination plaintiff is likely to find herself. Unlike job decisions with respect to hiring, firing, promotion, transfer and demotion, where an employee can usually get some picture of how women generally fare in such decisions, an employee typically has no way of knowing, short of discovery, how women overall are paid compared to men. As a result, it is particularly difficult to perceive individual instances of pay discrimination.

Perceiving discrimination is only half the battle. Even if an employee is able to perceive pay discrimination in the short window of time allowed by the court below, there are additional obstacles to filing a timely charge. As a general matter, research shows that employees rarely challenge discrimination, even when it is obvious. *See* Brake, *supra*, at 28-36 (discussing and citing social science literature documenting the obstacles to challenging discrimination). The high risk of retaliation and the social costs imposed on people who complain about discrimination sharply discourage women from reporting it to authorities or legal institutions. *See id.* at 37; Major & Kaiser, *supra*, at 294-96; Kaiser & Major, *supra* (manuscript at 25-32, 34). Even in the harassment context, for example, where the discrimination is more obvious and blatant, filing a complaint is a last resort, after other strategies have failed. *See* Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 Harv. Women's L. J. 3, 25-26 (2003) (reviewing surveys and studies of victim response to harassment).

In light of the personal costs of reporting discrimination, an employee who is aware of pay discrimination might reasonably tolerate it for some time, until the discrimination deficit becomes too much for her to tolerate. Yet under the ruling below, once a salary review takes place, the employee loses her chance to challenge pay discrimination first set in motion by prior decisions. Such a rule greatly dilutes Title VII's promise of nondiscrimination.

2. *Pay Discrimination That Begins When an Employee is Hired is Especially Difficult to Reach Under the Ruling Below.*

The decision below places an inordinate burden on all prospective Title VII claimants to quickly perceive and complain of each discriminatory salary decision. However, the lower court's rule has especially dire consequences for employees subjected to pay discrimination when they are first hired.

The time of hiring is a common departure point for salary discrimination. *See, e.g.*, Barry Gerhart, *Gender Discrimination in Current and Starting Salaries: The Role of Performance, College Major and Job Title*, 43 Indus. & Lab. Rel. Rev. 418, 427 (1990) ("even with a comprehensive group of control variables, the analysis shows that women had significantly lower starting and current salaries than men"). Supervisors often have more discretion in setting a starting salary than they do in subsequent adjustments to salary. *See* Kostas G. Mavromaras & Helmut Rudolph, *Wage Discrimination in the Reemployment Process*, 32 J. Hum. Resources 812, 813-14 (1997). Moreover, many job postings indicate a broad salary range rather than a specific salary, so new employees may not know that they are being paid less than other entry-level hires. *Id.* The practice of using prior salary as a baseline for establishing a starting salary can also lead to lower salaries for women at the time of hiring.[4] And,

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[4] A number of courts have rejected, under some circumstances, the use of prior salary to set entry-level wages as a defense to a *prima facie* case of pay discrimination under the Equal Pay Act and Title VII. *See, e.g.*, *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir.), *cert. denied*, 488 U.S. 948 (1988); *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 878 (9th Cir. 1982); *Futran v. Ring Radio Co.*, 501 F. Supp. 734, 739 (N.D. Ga. 1980); *see also* Jeanne M. Hamburg, Note, *When Prior Pay Isn't Equal Pay: A Proposed Standard for the Identification of "Factors Other Than Sex" Under the Equal Pay Act*, 89 Colum. L. Rev. 1085, 1108 (1989) (contending that employers should have the burden of justifying use of prior salary when it results in unequal pay).

as discussed in the previous section, wage discrimination that begins in a starting salary is likely to follow an employee throughout her career, amplified by the typical percentage-based adjustments that follow. Yet, the time of initial hire is when an employee's ability to perceive and complain of pay discrimination is at its lowest.

Limited exposure to the workplace undermines a new employee's ability to detect pay disparities and to sort out benign from discriminatory influences. The code of silence governing employee compensation is likely to be especially impenetrable for new employees. To the extent that employees ever learn comparable salary information, it is often through the kinds of informal connections with coworkers that develop over time. Many women do not learn until much later that they have been underpaid compared to their male counterparts for some time. *See, e.g., Goodwin v. General Motors Corp.*, 275 F.3d 1005, 1008-09 (10th Cir.), *cert. denied*, 537 U.S. 941 (2002) (plaintiff did not know what her colleagues earned until a printout listing of salaries mysteriously appeared on her desk, seven years after her starting salary was set lower than her coworkers' salaries); *McMillan v. Mass. Soc'y for the Prevention of Cruelty to Animals*, 140 F.3d 288, 296 (1st Cir. 1998) (plaintiff worked for employer for years before learning of salary disparity published in a newspaper).

A recently hired employee will also face a particularly thorny predicament in deciding whether to file a charge of discrimination within the Eleventh Circuit's timeframe. There are many good reasons why an employee might be unable or unlikely to challenge a discriminatory salary decision soon after being hired, foremost among them that she needs to keep her job. The most common reason for not challenging discrimination, the fear of retaliation, is likely to be most acute for new employees, who are especially vulnerable. Without the benefit of an established work record, a recently hired employee will have little to fall back on if

called upon to prove that an adverse action resulted from retaliation as opposed to job performance. *Cf.* 2 Arthur Larson, *Employment Discrimination* § 35.01, at 35-3 (2d ed. 2006) (explaining that a defendant may rebut a *prima facie* case of retaliation by offering a nondiscriminatory reason for its action, shifting the burden back to the plaintiff to prove that the proffered reason was pretextual). And with less of an opportunity to develop strong connections and support from colleagues and supervisors in the workplace, a new employee may be less inclined to risk retaliation by challenging a discriminatory pay decision. *See* Major & Kaiser, *supra*, at 295-96 (discussing the importance of social support as a factor influencing the decision to report discrimination). Concerns about retaliation also may be heightened for new employees who are hired at a lower point in the organizational hierarchy, compared to employees with longer tenure who have been able to work their way up. *See* Brake, *supra*, at 39-40.

For these reasons, the Eleventh Circuit's rule will likely remove from challenge much pay discrimination that begins in starting salaries, with devastating and long term financial consequences for the employees who suffer it.

3. *The Possible Applicability of a Discovery Rule Does Not Adequately Address These Problems.*

The Eleventh Circuit mistakenly assumed that equitable tolling principles could avert the danger that its ruling would defeat employees' Title VII rights. Pet. App. 19a n.16. As an initial matter, however, it is not clear whether and to what extent a discovery rule applies at all to Title VII claims.[5]

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[5] Although this Court has stated that equitable tolling principles apply under Title VII, it has never expressly declared that Title VII allows for a discovery rule. *See Morgan*, 536 U.S. at 105, 114 n.7; *id.* at 124 (O'Connor, J., concurring) (expressing the belief that "some version of the discovery rule applies to discrete-act claims"). With respect to pay claims in particular, until quite recently, the widespread reliance on *Bazemore* to

Even assuming that a discovery rule applies to all Title VII claims, as *amici* believe it should, its application will not ameliorate the harshness of the rule imposed by the court below. A court applying a discovery rule to a pay discrimination claim would likely start the limitations period running from the time the employee learns that a male comparator earned a higher salary, *see Inglis v. Buena Vista Univ.*, 235 F. Supp. 2d 1009, 1025 (N.D. Iowa 2002), even if the employee does not yet realize that discrimination has occurred. *See Oshiver v. Levin*, 38 F.3d 1380, 1386-87 (3d Cir. 1994) (describing the discovery rule in a discriminatory hiring and discharge case as starting the limitations period from the plaintiff's awareness of injury, not the awareness of a legal wrong). But using mere knowledge of a pay disparity to start the clock running would not solve the problems discussed above with respect to perceiving discrimination. Even if an employee fortuitously learns of a male colleague's salary, this information is unlikely to be accompanied by an explanation from the employer, broader wage data on the workplace, overt signs of prejudice, or any of the other information that enables employees to attribute adverse actions to discrimination. Consequently, the application of a discovery rule will not enable employees to overcome the obstacles to perceiving pay discrimination.

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treat each discriminatory paycheck as actionable provided little occasion to consider whether to adopt a discovery rule in such cases. *See Inglis v. Buena Vista Univ.*, 235 F. Supp. 2d 1009, 1021 (N.D. Iowa 2002) (explaining that, before *Morgan*, courts interpreted "pay claims as continuing violations of Title VII, regardless of whether the plaintiff challenged a single act of wage discrimination or a discriminatory pay policy"). As a result, the applicability of a discovery rule to pay claims is not settled. *Compare Hamilton v. 1st Source Bank*, 928 F.2d 86, 90 (4th Cir. 1990) (*en banc*) (rejecting a discovery rule for pay claims under the Age Discrimination in Employment Act and holding that the "last possible time that pay discrimination could have occurred was the date when [plaintiff] received his final paycheck") *with Inglis*, 235 F. Supp. 2d at 1025 (applying a discovery rule to Title VII pay discrimination claim).

Reliance on a discovery rule, however well-crafted, is an inadequate and undesirable solution to the predicament employees face under the decision below. The Eleventh Circuit's rule, as tempered by a discovery rule, would turn virtually every Title VII pay discrimination case into a pitched battle over what the plaintiff knew and when, requiring the fact finder to sort out the precise point in time at which the plaintiff had enough information to put her on notice that she had a pay discrimination claim. Because a paycheck itself is not inherently adverse, does not come with a list of comparators, and is unlikely to be accompanied by any explanation or overt signs of bias from the employer, a discovery rule is particularly difficult to apply in such cases. The typical triggers of notice present in other discrimination claims, such as notice of a demotion and the identity of one's replacement, are absent in a pay discrimination claim.

Rather than adopt a rule that would require protracted litigation over the timing and extent of the plaintiff's knowledge in virtually every pay discrimination case, this Court should reaffirm its position in *Bazemore* that each discriminatory paycheck is actionable, thus keeping the focus of the dispute on the critical question of whether the employer pays the plaintiff less because of her sex.

4. *The Eleventh Circuit Rule Pressures Plaintiffs to File First and Ask Questions Later.*

In order for an employee to avoid the harsh consequences of the Eleventh Circuit's rule, the prudent course of conduct would be to file a discrimination charge within 180 days of each new pay decision if she has the slightest reason to suspect that she is paid less than similarly situated males. At the outset, given the uncertainty about how a discovery rule might apply to pay claims, the decision below places the onus on the employee to find out quickly as much as she can about her colleagues' pay, at whatever cost to herself or to work-

place cohesion. *See* Bierman & Gely, *supra*, at 177-78 (explaining that learning other employees' salaries generates conflict among employees and undermines morale). Once she discovers a disparity in pay, an employee determined to protect her Title VII rights under the Eleventh Circuit's framework may find herself forced into an early litigation posture rather than take the time to pursue more informal and conciliatory strategies to protest her pay. *Cf. Int'l Union of Elec. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 236-40 (1976) (pursuit of a collective bargaining grievance procedure does not toll Title VII's limitations period). Such hypervigilance is not necessarily best for the employee, given the high costs of complaining of discrimination, discussed above, and is likely to lead to unnecessary litigation that could have been avoided but for the intense time pressures generated by the Eleventh Circuit.

Amici recognize that just because a rule operates harshly in practice does not justify the creation of a judicially crafted exception where the terms of the statute require such a result. *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980). But in this case, it is the Eleventh Circuit that departed from the terms of the statute and twenty years' experience under *Bazemore*. This Court should reject such a strict approach.

B. The Decision Below Discourages Voluntary Compliance and Invites Subterfuge.

The incentives placed on employers by the Eleventh Circuit in this case are flatly inconsistent with the deterrent purpose of Title VII. Under this approach, discriminatory wages in place long enough are effectively grandfathered in, eliminating an employer's incentive to voluntarily comply with Title VII. The lower court's ruling not only ends incentives for voluntary compliance, but actually deters employers from engaging in such efforts. Under the reasoning of the court below, undertaking a comprehensive salary review to examine gender equity could risk opening up the employer to

charges of pay discrimination that would otherwise be foreclosed by more narrowly confined, regular reviews of individual salaries. An employer would be better off leaving undiscovered any gender disparities in wages, and conducting periodic salary reviews allowing for only marginal modifications that are unlikely to raise any new allegations of discrimination. Surely Congress did not intend Title VII to discourage employers from proactively addressing gender-based pay disparities. *See, e.g., Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) (noting "Congress' intention to promote conciliation rather than litigation in the Title VII context"); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1979) ("Cooperation and voluntary compliance were selected as the preferred means for achieving [Title VII's] goal."). Indeed, to be consistent with other nondiscrimination requirements, Title VII must encourage employers to take such steps. *See, e.g.*, Exec. Order No. 11,246, 3 C.F.R. 339 (1964-65), *reprinted as amended in* 42 U.S.C. §2000e (2000) (placing affirmative obligations on federal contractors to take proactive steps to find and correct discriminatory practices, including illegal pay practices, in their workforce).

If the lower court's rule were allowed to stand, it is a safe bet that virtually *all* employers, if they had not done so already, would act quickly to establish regular *pro forma* salary reviews to insulate discriminatory pay decisions from challenge. In effect, the court's ruling invites employers to take advantage of a new, unprecedented and nearly failsafe affirmative defense to pay discrimination claims, without even placing the burden of persuasion on the employer. In a misguided effort to justify this approach, the Eleventh Circuit repeatedly chastised the plaintiff for not taking advantage of the opportunity provided in her annual review to raise her pay discrimination complaints with her employer. Pet. App. 24a ("[T]he timing of the employer's compensation system creates one, obviously preferable opportunity for an employee to make any pay-related complaints: the point at which the

employee's salary is reviewed and he or she is dissatisfied with the result."); Pet. App. 26a (distinguishing a contrary circuit precedent by noting, "[t]here is no indication . . . that the employer had in place any sort of system like Goodyear's, giving the plaintiff regular opportunities to complain of improperly deflated pay . . . ."); Pet. App. 31a (". . . Owen told Ledbetter that she would not be receiving a raise when he met with her to discuss her performance appraisal, and she made no complaint about being discriminated against.").

This Court has never placed the onus on a plaintiff to complain internally of discrimination as a prerequisite for an actionable Title VII claim, and for good reason. The lower court's emphasis on an employee's failure to complain to her employer at the time of her salary review fails to account for the bind confronting employees if they complain too soon without a sufficient basis for believing that Title VII was violated. *See Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273-74 (2001) (per curiam) (Title VII does not protect a plaintiff from retaliation if she lacked a reasonable belief that the conduct she opposed violated the statute). Instead, this Court has held that when a tangible employment action is involved, employer liability is automatic, regardless of whether the employee first complains informally or files an internal grievance. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 790 (1998). The much narrower affirmative defense adopted by this Court for the limited context of supervisory sexual harassment lacking a tangible employment action obviously has no applicability here, as there is nothing quite so tangible as a paycheck.

Under the Eleventh Circuit's framework, by providing regular salary reviews that enable only modest adjustments in wages, an employer could effectively nullify Title VII's prohibition on wage discrimination. Title VII's substantive protections must not be so easily thwarted.

III. THE DECISION BELOW CONTRAVENES TITLE VII'S LANGUAGE AND INTENT.

The decision below is contrary to the law of Title VII in many respects. *Amici* focus on three critical errors. First, the Eleventh Circuit's mistaken view of discriminatory intent led it to misconceive the unlawful employment practice that triggers the limitations period in a pay discrimination claim. Second, the lower court failed to consider the implications of Title VII's two-year back pay provision, 42 U.S.C. §2000e-5(g)(1) (2000). And finally, the court below disregarded the Civil Rights Act of 1991, which makes clear that Title VII permits a plaintiff to challenge the present implementation of a prior discriminatory decision.

A. The "Unlawful Employment Practice" is the Discriminatory Paycheck, Not the Underlying Intent.

The decision below mistakes an employer's *intent* to discriminate against women for the *disparate treatment* that effectuates that intent. It is the latter practice which comprises the "unlawful employment practice" that triggers Title VII's limitations period. 42 U.S.C. § 2000e-5(e)(1) (2000) ("A charge . . . shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . .").

In a Title VII pay discrimination case, the unlawful practice is the discriminatory paycheck that compensates a woman less because of her sex. *See Bazemore*, 478 U.S. at 395-96. Discriminatory intent is established when a plaintiff proves that she has received unfavorable treatment because of her sex. *See, e.g., County of Washington, Oregon v. Gunther*, 452 U.S. 161, 179 (1981) (Title VII plaintiff must prove "that her salary would have been higher had she been male"); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) ("'The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the

other sex are not exposed.'") (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). Thus, the unlawful practice that triggers the limitations period is the differential treatment, even if the underlying intent originated outside the limitations period.

The Eleventh Circuit went astray by viewing the "unlawful employment practice" as beginning and ending with the subjective intent of the decisionmaker. Pet. App. 24a ("[A]n employee . . . may look no further into the past than the last affirmative decision directly affecting the employee's pay immediately preceding the start of the limitations period. Other, earlier decisions may be relevant, but only to the extent they shed light on the motivations of the persons who last reviewed the employee's pay, at the time the review was conducted."). The court compounded its error by improperly defining discriminatory intent as a conscious ill will towards women and a lack of good faith, rather than the intent to pay a woman less because of sex. *Compare* Pet. App. 31a ("There was no evidence that he [Owen] bore any ill will towards Ledbetter or toward women generally") and Pet. App. 31a-32a n.21 ("It is not discriminatory to honestly rely on inaccurate information . . . and there was no evidence that Owen acted any way but in good-faith reliance on the information he was using.") *with Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (explaining that "the absence of a malevolent motive" does "not alter the intentionally discriminatory character of the policy").[6] In effect, the court incorrectly grafted a willfulness requirement

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[6] The lower court's view that good faith reliance on a discriminatory performance review does not violate Title VII as long as the person who implemented the discriminatory decision was unaware of the underlying bias, Pet. App. 31a-32a n.21, is simply not the law. *See Faragher*, 524 U.S. at 790 ("there is nothing remarkable in the fact that claims against employers for discriminatory employment actions with tangible results, like . . . compensation . . . , have resulted in employer liability once the discrimination was shown").

onto Title VII.[7] These misconceptions led the court to incorrectly view the unlawful employment practice as limited to the past, even though the discriminatory paychecks continued throughout the limitations period.

Under Title VII's plain language, it is the unlawful employment practice, not the underlying intent, that triggers the limitations period. That practice occurs with each paycheck that pays a woman less because of her sex.

B. Title VII's Allowance of Up to Two Years' Backpay Must Mean That a Plaintiff Can Challenge Pay Discrimination Traceable to Decisions Made Before the Limitations Period.

Title VII allows for recovery of backpay up to two years before the charge of discrimination is filed. 42 U.S.C. § 2000e-5(g)(1) (2000) ("Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission."). A necessary implication of this provision is that a Title VII plaintiff must be able to challenge pay discrimination that began before and continues into the filing period, and recover up to two years' backpay if the discrimination extends into that timeframe.

If the two-year backpay provision did not apply to pay discrimination claims such as Ledbetter's, it is difficult to imagine how it would have any application at all.[8] Under this

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[7] Although some form of malice, ill will, or intent to violate the statute is necessary for punitive damages, *see Kolstad v. Am. Dental Assoc.*, 527 U.S. 526, 529-30 (1999), no such intent is required to establish Title VII liability. *See, e.g., Albemarle*, 422 U.S. at 422 (holding that the employer's lack of "bad faith" was not a sufficient reason to deny backpay, and noting that "a worker's injury is no less real simply because his employer did not inflict it in 'bad faith'").

[8] Although in theory, the decision below might permit Title VII's two-year backpay provision to apply to cases where the most recent salary decision occurred two or more years before the charge was filed, this surely describes a tiny class of cases. Moreover, because the Eleventh Circuit explicitly declined to rule that a plaintiff could ever challenge a

Court's decision in *Morgan*, when a plaintiff challenges a discriminatory hiring, firing, demotion, promotion or transfer decision, the two-year backpay allowance does not apply. Because these are discrete, self-contained acts, recovery is limited to the consequences of that act, which, by definition (assuming a timely charge), begin during the limitations period. *See Morgan*, 536 U.S. at 114. For example, if a plaintiff was demoted on January 1, 2001, and filed a charge on the last day of the limitations period, her eligibility for backpay would not extend farther back than the demotion, or 180 days before she filed the charge.

Nor does the two-year backpay provision have any application to hostile environment harassment. Although a plaintiff may seek a remedy for harassment that occurred prior to the filing period as long as it forms part of the hostile environment that extends into the filing period, a hostile environment claim provides no occasion to seek backpay, as opposed to compensatory and punitive damages, for such prior acts.[9] The very nature of such a claim is that it does not involve something tangible like a loss of pay. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64-65 (1986).

Thus, Congress' allowance of up to two years' backpay would be rendered virtually meaningless if plaintiffs could not challenge and seek recovery for pay discrimination that began before and continued into the limitations period. *Cf. Sabree v. United Bhd. of Carpenters*, 921 F.2d 396, 401 (1st Cir. 1990) ("By allowing for the possibility of recovering

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pay decision that occurred outside the limitations period, this remote possibility is not a promising basis for salvaging § 2000e-5(g)(1).

[9] Backpay, as distinct from compensatory and punitive damages, is available for hostile environment harassment only where there has been a constructive discharge, which is treated the same as a termination for purposes of remedy. *See Pennsylvania State Police v. Suders*, 542 U.S. 129, 147 (2004) ("[A] prevailing constructive discharge plaintiff is entitled to all damages available for formal discharge. The plaintiff may recover postresignation damages, including . . . backpay . . . .").

back pay for over a year prior to the 300 day filing period, 'Congress must have envisioned continuing remediable violations that existed prior to the running of the period.'") (quoting Charles A. Sullivan et al., *Employment Discrimination*, §11.5 at 452 (1988)). Indeed, this provision has its most direct application to cases where the plaintiff challenges pay discrimination that began two or more years before the charge was filed and continued into the limitations period.[10]

The lower court's conclusion that it is a "necessary consequence" of *Morgan* that "the employee is limited to recovering for those paychecks received within the limitations period" does not withstand scrutiny. Pet. App. 24a-25a n.18. Although some other courts have also misinterpreted *Morgan* to bar plaintiffs from seeking backpay for pay discrimination that occurred prior to the filing period, they too have failed to explain how this limitation can be squared with § 2000e-5(g)(1). *See Shea v. Rice*, 409 F.3d 448, 451 (D.C. Cir. 2005); *Forsythe v. Fed'n Empl. & Guidance Serv.*, 409 F.3d 565, 573 (2d Cir. 2005).

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[10] The only other plausible use for § 2000e-5(g)(1) would be in cases in which equitable tolling was applied to extend the filing period beyond 180 days from the discriminatory act. *See, e.g.*, Douglas Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, 49 Law & Contemp. Probs. 53, 57-58 (Autumn 1986) (arguing that the two-year backpay allowance could be given effect by applying it to cases involving estoppel and fraudulent concealment). However, this is an odd way to make sense of the explicit language in § 2000e-5(g)(1), given that Title VII says nothing about equitable tolling at all, much less that the explicit two-year backpay allowance is limited to such cases. *See id.* at 58 (acknowledging that "Congress probably was not thinking about those cases" when it enacted this provision). Nor does this explanation do justice to Congress' design that backpay be broadly available to fulfill Title VII's remedial purposes and not limited to exceptional cases. *See Albemarle*, 422 U.S. at 416-23 (discussing the important role of backpay in Title VII's remedial scheme); *see also Morgan*, 536 U.S. at 113 (cautioning that equitable doctrines such as tolling and estoppel "are to be applied sparingly").

Morgan does not foreclose the application of § 2000e-5(g)(1) to pay discrimination claims. That case only barred recovery for discrete acts, such as hiring, firing, promotion, demotion and transfer decisions, that occurred outside the limitations period. *Morgan*, 536 U.S. at 114-15. It refused to fashion such a rule for all Title VII claims, specifically permitting plaintiffs to seek make-whole relief for earlier harassment that forms part of the same hostile environment that extends into the filing period. *Id.* at 119-21.

For purposes of crafting a remedy, pay discrimination falls on the harassment side of the line under *Morgan*. Much like acts of harassment, each discriminatory paycheck is part and parcel of the same discriminatory conduct. The accumulation of harm and the linkage of the discriminatory acts to the same discriminatory decision make pay discrimination precisely the type of discrimination for which the statute's two-year back-pay provision was designed.[11] Indeed, a number of courts have recognized that Title VII's two year backpay allowance applies to pay discrimination claims, both before and after *Morgan*.[12]

As this Court has long recognized, the allowance of backpay is a crucial part of Title VII's remedial scheme. *See Albemarle*, 422 U.S. at 416. Indeed, when Congress enacted the two-year backpay provision in 1972, it reaffirmed the

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[11] Because the two-year backpay allowance does not eliminate the need to prove a violation within the limitations period, there is no reason for concern about saddling defendants with stale claims. Moreover, to the extent that liability for up to two years of backpay for pay discrimination that continues into the limitations period is burdensome for employers, it is a burden that Congress explicitly imposed.

[12] *See, e.g.*, *Goodwin*, 275 F.3d at 1010; *Anderson v. Zubieta*, 180 F.3d 329, 337 (D.C. Cir. 1999); *Bereda v. Pickering Creek Indus. Park, Inc.*, 865 F.2d 49, 54 (3d Cir. 1988); *Merrill v. S. Methodist Univ.*, 806 F.2d 600, 606 (5th Cir. 1986); *Lovell v. BBNT Solutions, LLC*, 299 F. Supp. 2d 612, 615 (E.D. Va. 2004); *Tomita v. Univ. of Kan. Med. Ctr.*, 227 F. Supp. 2d 1171, 1180 (D. Kan. 2002).

importance of backpay and specifically rejected proposals to restrict it, including a less generous provision that would have authorized the accrual of backpay only up to two years prior to filing a complaint in court. *Id.* at 420-21 & n.13. In order to effectuate Congress' remedial policy, Title VII plaintiffs must be able to challenge pay discrimination that begins before and extends into the filing period, and seek up to two years' backpay from the date the charge was filed. *Cf. Gunther*, 452 U.S. at 178 ("We must . . . avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate.").

C. The Court Below Disregarded Congress' Intent in Enacting the Civil Rights Act of 1991.

Congress enacted the Civil Rights Act of 1991 in part to overturn a series of Supreme Court decisions that unduly narrowed the protection available to discrimination victims. One of the decisions that prompted Congress to act was *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989).

In *Lorance*, the plaintiffs challenged a 1979 collective bargaining agreement that changed the calculation of seniority. *Id.* at 902-03. Although this recalculation did not immediately affect the plaintiffs, it caused them to be demoted in 1982. *Id.* The plaintiffs filed a Title VII charge arguing that the 1979 change in seniority discriminated against women. *Id.* Although the charge was timely as measured from the demotions, this Court held the charge time-barred, ruling that the adoption of the 1979 agreement triggered the limitations period. *Id.* at 911. The Court reasoned that the violation occurs when the discriminatory decision is made, not when its effects are felt. *Id.* at 908-09.

Congress responded by enacting a provision in the 1991 Act specifically designed to overturn the result in *Lorance*:

> For the purposes of this section, an unlawful employment practice occurs . . . when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured

> by the application of the seniority system or provision of the system.

42 U.S.C. § 2000e-5(e)(2) (2000).

This provision, although limited by its terms to seniority systems, was intended as a broad repudiation of the reasoning in *Lorance* and an endorsement of the approach taken in *Bazemore*. In enacting this provision, Congress clarified its intent that Title VII reach ongoing practices that perpetuate discrimination, both with respect to seniority systems and beyond. *See* 137 Cong. Rec. S15483, S15485 (daily ed. Oct. 30, 1991) (interpretive memorandum of Sen. Danforth) ("This legislation should be interpreted as disapproving the extension of this decision rule [in *Lorance*] to contexts outside of seniority systems.").

Significantly, with this provision, Congress saw itself as endorsing and generalizing the result in *Bazemore*. As the Senate Report accompanying the proposed Civil Rights Act of 1990, the precursor to the 1991 Act, carefully explained:

> Section 7(a)(2) does not alter existing law regarding when an employer's discrete action is, and is not, a continuing violation of the law; rather, the provision concerns employer rules and decisions of on-going application which were adopted with an invidious motive. Where, as alleged in *Lorance*, an employer adopts a rule or decision with an unlawful discriminatory motive, each application of that rule or decision is a new violation of the law. In *Bazemore* . . ., for example, . . . the Supreme Court properly held that each application of that racially motivated salary structure, i.e., each new paycheck, constituted a distinct violation of Title VII. Section 7(a)(2) generalizes the result correctly reached in *Bazemore*.

Civil Rights Act of 1990, S. Rep. No. 101-315, at 54 (1990).[13] In explaining that the *Lorance* provision would not

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[13] The Senate did not submit a report with the Civil Rights Act of 1991. *See* Civil Rights Act of 1991, H.R. Rep. No. 102-40(I), at 1 (1991), *as*

undercut this Court's precedents on continuing violations, Congress repeatedly cited *Bazemore* with approval.[14]

To now rule that Title VII prevents a plaintiff from challenging the perpetuation of pay discrimination that began before the filing period would disregard Congress' intent in enacting the Civil Rights Act of 1991.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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reprinted in 1991 U.S.C.C.A.N. 549 (noting that no Senate report was submitted).

[14] *See, e.g.*, Civil Rights Act of 1991, H.R. Rep. No. 102-40, pt. 1, at 62 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 549, 600 n.58; Civil Rights Act of 1991, H.R. Rep. No. 102-40, pt. 2, at 24 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 694, 717-18 & n.39; Civil Rights Act of 1990, H.R. Rep. No. 101-644, pt. 1, at 74 & n.78 (1990); Civil Rights Act of 1990, H.R. Rep. No. 101-644, pt. 2, at 31 & n.41 (1990).

APPENDIX

APPENDIX

INDIVIDUAL STATEMENTS OF INTEREST OF *AMICI CURIAE*

9to5, National Association of Working Women is a national membership-based organization of low-wage women working to improve the workplace and end discrimination. 9to5's members and constituents are directly affected by pay disparities, sex discrimination and the difficulties of seeking and achieving redress for these issues. Our toll-free Job Survival Hotline fields thousands of phone calls annually from women facing these and related problems in the workplace.

For 125 years, the *American Association of University Women* (AAUW), an organization of over 100,000 members and 1,300 branches nationwide, has worked to promote education and equity for all women and girls. AAUW's 2005-07 member-adopted Public Policy Program states that AAUW is committed to supporting fairness in compensation, equitable access and advancement in employment, and vigorous enforcement of employment antidiscrimination statutes. AAUW believes that pay equity is a simple matter of justice and continues to support initiatives that seek to close the persistent and sizable wage gap between men and women.

The *American Civil Liberties Union* ("ACLU") is a nationwide, nonprofit, nonpartisan organization of more than 600,000 members, dedicated to preserving the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. Through its Women's Rights Project, founded in 1972, the ACLU has long sought to ensure that the law provides individuals with meaningful protection from employment discrimination on the basis of gender. The ACLU Women's Rights Project is also devoted to advancing the economic empowerment of

women, as such empowerment is key to gender equality. The proper resolution of this pay discrimination case is a matter of substantial interest to the ACLU and its members.

The *Coalition of Labor Union Women* (CLUW) is a nonprofit national organization for union women dedicated to the economic, political and social advancement of women and all workers. For thirty-five years CLUW has been addressing economic issues and concerns important to working women and their families through legislative efforts and at the workplace, including the elimination of sex- and race-based wage discrimination.

The *Connecticut Women's Education and Legal Fund* (CWEALF) is a non-profit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF defends the rights of individuals in the courts, educational institutions, workplaces and in their private lives. Since it's founding in 1973, CWEALF has provided legal information and conducted public policy and advocacy to ensure women have equal employment opportunities and are free from workplace discrimination.

Equal Rights Advocates (ERA) is a San Francisco-based women's rights organization whose mission is to secure and protect equal rights and economic opportunities for women and girl through litigation and advocacy. Founded in 1974, ERA has litigated historically important gender-based discrimination cases, including *Geduldig v. Aiello*, 417 U.S. 484 (1974), *Richmond Unified School District v. Berg*, 434 U.S. 158 (1977), and is co-counsel in the current sex discrimination case of *Dukes v. Wal-Mart Stores*, in the United States District Court, Northern District of California. ERA has appeared as *amicus curiae* in numerous Supreme Court cases involving the interpretation of Title VII including *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Burlington*

Industries v. Ellerth, 524 U.S. 742 (1998); and *Burlington Northern and Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405. ERA believes the issues raised by the instant case are equally critical to women workers who historically have been paid less than men.

The *Feminist Majority Foundation* (the Foundation), is a non-profit organization with offices in Arlington, VA and Los Angeles, CA. The Foundation is dedicated to eliminating sex discrimination and to the promotion of women's equality and empowerment. The Foundation's programs focus on advancing the legal, social, economic, and political equality of women with men, countering the backlash to women's advancement, and recruiting and training young feminists to encourage future leadership for the feminist movement. To carry out these aims, the Foundation engages in research and public policy development, public education programs, litigation, grassroots organizing efforts, and leadership training programs.

Hadassah, the Women's Zionist Organization of America, founded in 1912, is the largest women's and Jewish membership organization in the United States, with over 300,000 members nationwide. In addition to Hadassah's mission of maintaining health care institutions in Israel, Hadassah has a proud history of protecting the rights of women and the Jewish community in the United States. Hadassah strongly supports stricter enforcement of pay equity laws, improvements in restrictive pension policies and support for measures that will reduce the wage gap and bring about real economic security for women.

Legal Momentum advances the rights of women and girls by using the power of the law and creating innovative public policy. Legal Momentum advocates in the courts and with federal, state, and local policymakers, as well as with unions and private business, to promote recruitment and retention of women in non-traditional jobs. Legal Momentum has liti-

gated cases to secure full enforcement of laws prohibiting sex discrimination, including *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and has participated as *amicus curiae* on leading cases in this area, including *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). Legal Momentum is fully aware that pay discrimination against women remains pervasive, and is deeply concerned with assuring that long-standing discriminatory pay practices remain actionable under Title VII.

MANA National Latina Organization believes that unless our culture and processes recognize institutional disparities there will always be an unacceptable gap in salaries. In this country where the fullness of one's life is dictated by earnings, unequal pay is guaranteeing a life of despair and disparity for women who are now the majority of the population in the United States. The most serious argument is that it is telling future generations that women are not valued and that their work does not merit the same pay consideration.

Founded in 1996, the *National Asian Pacific American Women's Forum* (NAPAWF) is dedicated to forging a grassroots progressive movement for social and economic justice and the political empowerment of Asian Pacific American women and girls. The economic empowerment of all women is one of the central issues that forms the basis of NAPAWF's advocacy. NAPAWF supports the plaintiff in *Ledbetter v. Goodyear Tire* because the persistence of wage discrimination prevents women, particularly women of color, from achieving equality and economic security in the workplace. Moreover, the difficulties of perceiving and filing claims of pay inequity are often multiplied for women of color.

Established in 1955, the *National Association of Social Workers* (NASW) is the largest association of professional social workers in the world with 149,000 members and

chapters throughout the United States, in Puerto Rico, Guam, the Virgin Islands, and an International Chapter in Europe. With the purpose of developing and disseminating standards of social work practice while strengthening and unifying the social work profession as a whole, NASW provides continuing education, enforces the *NASW Code of Ethics*, conducts research, publishes books and studies, promulgates professional criteria, and develops policy statements on issues of importance to the social work profession. NASW recognizes that discrimination and prejudice directed against any group are not only damaging to the social, emotional, and economic well-being of the affected group's members, but also to society in general. NASW has long been committed to working toward the elimination of all forms of discrimination against women. NASW policies support "measures that allow women who are discriminated against in employment and compensation to seek full legal and fiscal compensation." NATIONAL ASSOCIATION OF SOCIAL WORKERS, *Women's Issues*, SOCIAL WORK SPEAKS, 366, 370 (2003). Accordingly, given NASW's policies and the work of its members, NASW has expertise that will assist the Court in reaching a proper resolution of the questions presented in this case.

The *National Council of Women's Organizations* is a coalition of over 200 of the nation's largest and most influential women's groups. Representing 10 million women nationwide, NCWO groups support full enforcement of laws that prohibit sex discrimination in employment. NCWO groups recognize the long-term effects that persistent wage disparities have on women's economic security as well as the difficulties women face in identifying and complaining about discriminatory pay practices.

The *National Organization for Women Foundation* is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. Created in 1986, NOW

Foundation is affiliated with the National Organization for Women, the largest feminist organization in the United States, with over 500,000 contributing members in more than 450 chapters in all 50 states and the District of Columbia. Since its inception, NOW Foundation's goals have included achieving equal employment opportunities for women. To that end, NOW Foundation advocates for vigorous enforcement of Title VII of the Civil Rights Act, prohibiting discrimination on the basis of sex.

The *National Partnership for Women & Families* is a nonprofit, national advocacy organization founded in 1971 that promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious workplace discrimination, and has filed numerous briefs *amicus curiae* in the U.S. Supreme Court and in the federal circuit courts of appeal to advance the opportunities of women and people of color in employment.

The *National Women's Law Center* (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace, with special attention to women in non-traditional work environments. NWLC has prepared or participated in the preparation of numerous amicus briefs in cases involving sex discrimination in employment before this Court and the federal courts of appeals.

The *Northwest Women's Law Center* (the "Law Center") is a regional nonprofit organization dedicated to advancing and protecting the legal rights of women through litigation, legislation and education. The Law Center provides these services to women in Washington, Alaska, Montana, Idaho and Oregon. Since its founding in 1978, the Law Center has fought to ensure and protect women's legal rights to equal

pay for equal work. The Law Center has worked on legislative initiatives both locally and nationally to further this aim. The Law Center has also participated as *amicus curiae* in several sex discrimination cases throughout the country and before the United States Supreme Court.

Pick Up the Pace is a San Francisco-based non-profit organization whose mission is to identify and eliminate barriers to women's advancement in the workplace, with emphasis on glass ceiling discrimination, gender stereotyping and work/family conflict. Established in 2005, the organization seeks to raise awareness of cutting edge gender bias issues in the workplace through public education, technical assistance, and legal advocacy, including the filing of amicus briefs in this Court, most recently in the case of *Burlington Northern & Santa Fe Railway Co. v. Sheila White.*

The *Women's Law Center of Maryland*, Inc. is a nonprofit, membership organization with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination, workplace issues and family law. The Women's Law Center seeks to protect women from discrimination and pay disparities in employment.

Wider Opportunities for Women (WOW) is a non-profit organization established in 1964 that works nationally and in its home community of Washington, DC to achieve economic independence and equality of opportunity for women and girls. WOW's programs focus on building pathways to economic security through technical and non-traditional skills, ensuring a workplace and supports responsive to the needs of families, career development and family economic self-sufficiency. A woman's economic security very much depends on her ability to obtain an education free of gender bias.

Women Employed's mission is to improve the economic status of women and remove barriers to economic equity.

Women Employed promotes fair employment practices, helps increase access to training and education, and provides women with information and tools to plan their careers. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed strongly believes that pay discrimination is one of the main barriers to achieving equal opportunity and economic equity for women in the workplace.

The *Women's Advocacy Project, Inc.* ("the Project") is a statewide legal non-profit organization based in Austin, Texas (www.women-law.org). The Project promotes access to justice for Texas women and children in need. Started in 1982 as a legal hotline, the agency has evolved as an expert on legal issues affecting survivors of domestic violence and sexual assault, and now provides a range of legal services to end violence against women.

The *Women's Bar Association of the District of Columbia* (WBA-DC), which was founded in 1917, advances and promotes the interests of women lawyers; promotes the administration of justice; and works to maintain the honor and integrity of the legal profession. Among its many activities, the organization monitors legislation and files amicus briefs on issues vital to its members and the Bar. WBA-DC has an interest in protecting the legal rights of women workers, both within and outside of the legal profession, as guaranteed by Title VII of the Civil Rights Act of 1964. The organization is particularly interested in defending the right of women to seek redress for longstanding inequalities in the workplace, including gender-related differences with respect to compensation and benefits. WBA-DC therefore files as an amicus in this matter in the interest of protecting the rights of victims of gender-related

pay discrimination to seek and receive just compensation for all of the harm caused by the discriminatory conduct of their employers.

The *Women's Law Project* (WLP) is a non-profit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public policy development, public education and individual counseling. Throughout its history, the WLP has worked to eliminate sex discrimination, bringing and supporting litigation challenging discriminatory practices prohibited by federal civil rights laws. The WLP has a strong interest in the proper application of civil rights laws to provide appropriate and necessary redress to individuals victimized by discrimination.